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INDEX

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CITATIONS

Cases:

Cases—Continued. Page

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 87

MIKHAIL NICHOLAS GORIN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 88

HAFIS SALICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 710–736) is reported in 111 F. (2d) 712.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 22, 1940 (R. 738). The peti-

tion for writs of certiorari was filed May 21, 1940, and granted June 3, 1940 (R. 739). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

Petitioners were convicted under Sections 1 (b) and 2 (a) of the Espionage Act for obtaining and revealing information connected with the "national defense." The questions[1] are:

1. Whether they were properly convicted under their own theory of those provisions, limiting "national defense" to the 24 places and things specified in Section 1 (a) of the Act.

2. Whether Sections 1 (b) and (2) (a) of the Espionage Act make it a crime to obtain and divulge information relating to the "national defense" but which is not directly related to the places and things specified in Section 1 (a) of the Act.

3. If so, whether those sections are so indefinite as to be unconstitutional.

4. Whether, under either theory of the Act, the court should have ruled as a matter of law that the information obtained by Salich and furnished to

[1] The questions listed, except the first, are those discussed in the brief for the petitioners. A sixth contention is stated but not argued by petitioners (see *infra*, p. 102).

Gorin was too innocuous to relate to the national defense.

5. Whether Sections 1 (a) and 2 of the Espionage Act make it a crime to obtain and divulge information relating to the national defense which is intended to be used to the advantage of a foreign

31–38), are printed in Appendix A, infra, pp. 104–110.

STATUTES INVOLVED

The pertinent sections of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 217 (50 U. S. C. §§ 31–38), are printed in Appendix A, *infra*, pp. 104–110.

STATEMENT

1. *Proceedings Below.*—On January 11, 1939, an indictment in three counts was returned against the petitioners and another [1] in the District Court for the Southern District of California (R. 2–8). The first count charged a violation of Section 1 (b) of the Espionage Act; the second count a violation of Section 2 (a); and the third count a conspiracy to violate Section 2 (a), in violation of Section 4. The first count (R. 2–3) alleged that the defendants, for the purpose of obtaining information respecting the national defense, and with intent and reason to believe that the information to be obtained was to be used to the injury of the United States and to the advantage of a foreign nation, did copy, take, make, and obtain certain documents,

[1] The codefendant, Natasha Gorin (the wife of petitioner Gorin), was acquitted on all three counts (R. 32, 408, 462).

writings, and notes connected with the national defense, i. e., confidential information, reports, instruments, documents, and writings pertaining to and concerning various and numerous individuals under suspicion, observation, surveillance, and investigation belonging and contained in United States Naval Intelligence files and reports, which were described by number. The second count (R. 4–5) alleged that the defendants communicated, delivered, and transmitted to the defendant Gorin, as a representative and citizen of a foreign nation, various documents, writings, notes, instruments and information relating to the national defense, describing the same Naval Intelligence reports as were enumerated in Count 1. The third count (R. 5–8) alleged that the defendants conspired to communicate, deliver, and transmit to a foreign power and to Gorin as its representative and citizen, and to other unknown persons, documents, writings, plans, notes, instruments, and information relating to the national defense, i. e., confidential reports, etc., contained in the files of the United States Naval Intelligence.

Each of the petitioners was found guilty on all three counts (R. 32, 462). The petitioner Gorin was sentenced to two years' imprisonment and a $10,000 fine on the first count and to six years' imprisonment on each of the other counts, the terms of imprisonment to run concurrently (R. 35–37). Petitioner Salich was sentenced to two years' im-

prisonment and a $10,000 fine on the first count, and to four years' imprisonment on each of the other two counts, the terms of imprisonment to run concurrently (R. 37–39). On appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgments of conviction were unanimously affirmed (R. 710–736, 738).

The evidence in its main outline is undisputed and uncontradicted (see Pet. Br. 6); there are, however, numerous minor discrepancies as to detail. The evidence may be summarized as follows:

2. *The Naval Intelligence Office.*—The main office of the Eleventh Naval Intelligence District is at San Diego, California; the District Intelligence Officer is responsible to the Director of Naval Intelligence in Washington and to the Commandant of the Naval District (R. 109–110, 223, 307. A branch office is located at San Pedro, California, and is in charge of an Assistant Intelligence Officer (R. 110, 223). Lieutenant Commander Roachefort was in charge at San Pedro until May 1938, and Lieutenant Commander Claiborne thereafter (R. 113, 223). The office staff consists of a chief yeoman, who does secretarial work, and two civilian investigators (R. 96–97, 110–111).

The investigators were the petitioner Salich and one Stanley. Their duties were largely in the nature of counter-espionage (R. 224–225). They worked together, using an automobile and the apartment of Salich, and kept no regular working

hours (R. 128). They were not always given specific assignments, and were often left to their own initiative (R. 302). They generally gave the Assistant Intelligence Officer written reports, prepared either at their homes or at the office (R. 111, 121). Salish was paid $3,000 a year, with $1,000 allowed for expenses, out of cash funds to the credit of the Assistant Intelligence Officer (R. 224, 297–298).

The reports brought in by the investigators were digested by the Assistant Intelligence Officer and then destroyed (R. 111, 121–122). The original and two carbons of the Assistant Intelligence Officer's reports were sent to the San Diego office (R. 111, 121, 123). One of the copies retained at San Pedro was placed in the topical files of the Assistant Intelligence Officer and the other was placed in the Chief Yeoman's desk, arranged chronologically, for the investigators to read when they came to the office (R. 111–112, 335–336, 368).

The reports were not shown to anyone but the intelligence personnel[3] (R. 125, 312). Salich had often been told that his work was confidential (R. 99, 116, 137–139, 229, 299, 301). Indeed, he was asked not to reveal his connection with the Naval Intelligence (R. 100, 299, 366–367), and used

[3] Lieutenant Claiborne, in response to a subpoena in this trial, refused on instructions of his superiors to reveal any reports save those which Salich had communicated to Gorin (R. 310–311).

a Los Angeles police department badge in his work (R. 366).

3. *Salich and Gorin.*—Salich was born in Moscow in 1905; his father was a storekeeper (R. 329). His family fled to the east after 1917 and arrived in San Francisco in 1923 (R. 329–330). Salich became an American citizen in 1929 (R. 359). He worked in the Berkeley Police Department from 1930 to 1936, where he had an excellent reputation (R. 330, 382). Since August 1936 he had been employed in the Naval Intelligence Office at San Pedro (R. 331, 366–368). He was married in 1932 and separated from his wife in January 1938; a separation agreement, under which he was to pay her $125 a month until February 1939, was terminated by a property settlement of $500 in November 1938 (R. 325–326).

Gorin is a citizen of the Union of Soviet Socialist Republics (R. 89–90). He arrived in the United States in January 1936, and was employed as Director of the Los Angeles office of Intourist, Inc., a subsidiary of Amtorg Trading Corporation (R. 90, 214, 216–217). He received a salary of about $3,300 a year, without expenses (R. 145, 218).

Salich had become acquainted with Aliavdin, a vice consul of U. S. S. R., in 1935, and saw him occasionally during the next two years[4] (R. 168–

[4] He refused in 1937 to give Aliavdin information as to Japanese activity in the United States (R. 168–169, 198).

169, 198, 330). Although Salich had met Gorin in August 1937, while seeking to get information requested by Lieutenant Roachefort as to a Soviet official (R. 333), they seem not to have been acquainted until Gorin in December 1937 presented a letter of introduction from Aliavdin[6] (R. 169, 178, 198, 334). One or several days after Gorin left the letter of introduction with Mrs. Salich, Salich went to Gorin's home, which they left to go to a nearby cocktail lounge (R. 169, 178, 198, 336).

At this first meeting, Gorin asked Salich to give him information relating to Japanese activities in the United States, assuring Salich that no harm could be done the United States. Salich said his information would be of no aid; Gorin said that one could never tell. Salich either refused or said he would think it over. (R. 169, 178, 336–337, 369.) After a few social meetings Gorin repeated his request and Salich agreed (R. 179–180, 198, 342–344). Salich thereafter met Gorin every few weeks, for a total of about 15 times, between March and December of 1937 (R. 170, 179, 327, 342, 363–364).

4. *Information Given Gorin.*—Gorin was interested only in Japanese activities (R. 180, 336, 346,

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[6] Stanley testified that Salich in June 1937 said Gorin was a friend who might be a useful informant (R. 128–129) and that Salich in July 1937 invited him to meet some Russian flyers at Gorin's home (R. 130). Salich denied that he knew Gorin lived at the address to which they went (R. 334, 380).

378), and specifically disclaimed interest in information concerning the United States (R. 170). Salich said that he was unable to obtain "secret" information and that he would not have furnished it to Gorin if he had been able to obtain it (R. 182, 365). Gorin assured Salich that the information, even though unimportant in itself, might fit into a larger picture of Japanese espionage in the United States and in the U. S. S. R. (R. 180, 338, 365, 378–379). While he told Salich that his superiors were dissatisfied with the insignificant value of the information (R. 171, 181, 349, 363, 365), he did not accept Salich's offer to terminate their arrangement (R. 349, 364–365). Salich appears to have furnished Gorin with substantially all of the information gathered during this period by the Naval Intelligence Office at San Pedro which concerned Japanese activities (R. 199, cf. 369).

The information was given by oral or written summaries of the reports on file in the Naval Intelligence Office;[6] the reports themselves were not furnished (R. 162, 163–164, 170, 351, 368–369; see R. 295. The information given Gorin was taken from some 53 Naval Intelligence Reports,[7] and

[6] The information included that gathered by Stanley as well as by Salich (R. 139–141).

[7] Forty-three of these reports are in evidence (R. 259–294). Three are not: Report Nos. 1070 (R. 175), 1116 (R. 172–173), 1152 (R. 175). Some part of the information from each of seven additional reports was given: Report Nos. 552 (R. 160), 849 (R. 174), 859 (R. 174, 240–241), 967 (R. 174), 973 (R. 175), 1066 (R. 175, cf. R. 373), 1088 (R. 175).

Salich was not sure whether or not he gave Gorin the information from 10 additional reports.[8]

The majority of the reports, 32 in number, dealt with the movements and activities of named Japanese persons or organizations;[9] they appear innocuous on their face but might have value when linked with other information concerning the subjects of the reports (R. 715). Three dealt with the sentiments and patriotism of the Japanese-American colony.[10] Nine dealt with some 21 suspected Japanese spies;[11] and three with the activities of suspicious Japanese boats.[12] Two narrated Japanese military or sabotage inventions and suspected plans.[13] Three named Japanese in Cali-

[8] Report Nos. 478 (R. 163), 487 (R. 163), 522 (R. 161), 540 (R. 161), 541 (R. 161), 551 (R. 160), 554 (R. 160), 565 (R. 159), 854 (R. 174), 861 (R. 174).

[9] Report Nos. 435 (R. 294), 439 (R. 293), 465 (R. 293), 466 (R. 292), 469 (R. 292), 472 (R. 291–292), 477 (R. 291), 479 (R. 291), 480 (R. 289–290), 482 (R. 289), 489 (R. 288–289), 495 (R. 287–288), 503 (R. 285–286), 504 (R. 284–285), 505 (R. 284), 514 (R. 280), 519 (R. 280), 525 (R. 279), 528 (R. 278–279), 529 (R. 278), 530 (R. 277–278), 534 (R. 277), 535 (R. 276), 536 (R. 275–276), 546 (R. 275), 833 (R. 259, 295), 841 (R. 260, 295), 897 (R. 265–266), 1104 (R. 268–269), 1133 (R. 263–264), 1139 (R. 263), 1145 (R. 262–263).

[10] Report Nos. 495 (R. 287–288), 532 (R. 277), 1133 (R. 263–264). Here, as in the succeeding footnotes, a few of the reports cover more than one topic and duplicate earlier listings.

[11] Report Nos. 507 (R. 281–282), 528 (R. 278–279), 548 (R. 274), 570 (R. 270–271), 973 (R. 175), 1081 (R. 269–270), 1104 (R. 268–269), 1110 (R. 266–267), 1129 (R. 265).

[12] Report Nos. 536 (R. 275–276), 560 (R. 271–274), 1081 (R. 269–270).

[13] Report Nos. 560 (R. 271–274), 1132 (R. 264).

fornia who were thought to be communists;[14] Salich seems to have given the information in order that Gorin might get in touch with them himself (R. 173, 175). Four reports were concerned with Americans suspected of being communists;[15] these, too, appear to have been given Gorin with the thought that he might approach them himself (R. 174). One report dealt with a suspected German spy.[16]

Gorin assured Salich that the information could not harm the United States and that the U. S. S. R. did not want information which would do so (R. 182, 212–213, 339, 343, 375). Salich recognized his weakness and the unethical nature of his acts (R. 183), but testified that he did not believe it could harm the United States (R. 147, 181–183, 359). He said that he and Gorin each felt that the information would benefit the U. S. S. R. only so far as it had a common interest with the United States in opposition to Japan (R. 170, 172, 180, 182, 338–339, 343, 359, 360). Salich said that he did not think his conduct was in violation of the Espionage Act (R. 147, 182–183, 200).

5. *Financial Arrangements.*—Salich accepted financial assistance from Gorin at about the time

[14] Report Nos. 833 (R. 259, 295), 841 (R. 260, 295), 1130 (R. 264–265).

[15] Report Nos. 849 (R. 174, cf. R. 262), 889 (R. 261–262, 295, 174, 240), 967 (R. 174), 1066 (R. 175, cf. R. 373).

[16] Report No. 1088 (R. 175).

he commenced to furnish information from the Naval Intelligence reports.[17] Between March and November 1938 Gorin gave Salich at irregular intervals six payments of $200 and one of $500, for a total of $1,700 (R. 170, 180–181, 198, 350, 361–362).[18] Salich said that he did not expect to receive any further payments (R. 366), and that he spent at least $100 of the money on Navy business (R. 175).

Salich testified that he considered the payments to be a loan, which he expected to repay after he had settled his affairs with his estranged wife (R. 343–344, 350–351). But he told Gorin of this understanding "just as a bythought" (R. 181). He also viewed the payments more or less as a gift (R. 170, 345). There was no definite understanding as to the amount he was to receive (R. 364); he gave Gorin neither receipts nor notes (R. 363); and he kept only mental note of the amounts received (R. 364). Gorin once offered to pay double for better information (R. 172).

6. *Disclosure to Superiors.*—Salich told Stanley, his coinvestigator, of Gorin's offer to pay for in-

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[17] Salich's statements take two forms: (1) he at first refused to accept money for the information (R. 178–179, 339); and (2) he first agreed to furnish the information at a meeting at which Gorin offered financial assistance (R. 179–180, 342–344).

[18] It was also suggested that Gorin might arrange a trip to the U. S. S. R. for Salich, either without cost (R. 172) or at a reduced rate (R. 314, 315, 348).

formation of Japanese activities (R. 132, 137). Stanley threatened to tell Lieutenant Roachefort if Salich did not (R. 133–134). In March 1938 Salich told Roachefort that Gorin had approached him and offered money for information as to Japanese espionage; Roachefort told him not to see Gorin again, at least without the presence of Stanley (R. 103, 105, 116, 123, 126, 135, 172, 246–247).[19] However, Salich advised Stanley, who did not protest, that he would not take him to Gorin for fear that this would destroy Gorin's value as a source of information (R. 341), or possibly as a source of money (R. 136).

Gorin had promised in return to give Salich information (R. 344, 346). He did offer some information, inconsequential in nature (R. 345, 347, 354–355, 371, 373) and some of which was false (R. 175). Salich reported some but not all of this information to his superiors (R. 347, 355, 371, 373–374). He testified at the trial that he told both Roachefort and Claiborne he was receiving information from Gorin (R. 342, 347, 370–371, 374). Roachefort, on duty in Cuba (R. 122), was not present at the trial; Claiborne denied that he had been so informed (R. 305–306, 312, 383–384).

[19] Salich said that Roachefort told him to give Gorin information available in newspapers and magazines (R. 337) and to see just what Gorin was after (R. 172, 341, 370). This statement is uncorroborated by the other witnesses to the conversation, was advanced by Salich only in part prior to the trial (R. 246–247, cf. R. 172), and presumably was not accepted by the jury.

Salich did not tell his superiors that he was receiving money from Gorin (R. 371, 377).

7. *Discovery and Arrest.*—A laundry salesman on September 30, 1938, found a digest of Naval Intelligence reports (R. 295) and a $50 bill in an envelope left in Gorin's clothes which were sent to be cleaned (R. 72). On learning of Mrs. Gorin's unusual interest (R. 79–80, 81–83, 84–86), he took the envelope to the Hollywood Police Station, where a copy of the digest was made (R. 73–74, 87–88, 94–95). The original was placed in the envelope and returned to Mrs. Gorin (R. 74).

Salich was arrested by agents of the Federal Bureau of Investigation on December 10, 1938 (R. 146–149). He cooperated fully with the agents, and selected the reports from which he had given Gorin information (R. 148–149, 150–165). He made full confession of the facts (R. 168–175, 178–183).

Gorin was arrested on December 12 (R. 185). He refused to discuss the case, except to deny that Salich had given him information (R. 186), until he had consulted the Soviet Embassy in Washington (R. 185–186, cf. 315–316). He conducted four telephone calls with the Embassy while the agents were in his office (R. 187–188), and was advised by the Soviet vice-consul for New York, who visited him at the jail, to say nothing (R. 207, 210). He offered no evidence at the trial and did not take the stand.

SUMMARY OF ARGUMENT

I

A. Petitioners were convicted under their own theory of Sections 1 (b) and 2 (a) of the Espionage Act. In defining the term "national defense" the trial judge limited its meaning substantially to the places and things enumerated in Section 1 (a). Petitioners' objection goes only to the concluding portion of the charge, where the trial court left to the jury the *connection* of the revealed information to the national defense.

B. The Court will not review the evidence supporting the judgments below. But there was ample evidence to support the conviction upon the petitioners' theory. The Naval Intelligence office at San Pedro is plainly included within the places enumerated in Section 1 (a). The information given Gorin was taken from, and related to, the work of that office. More broadly viewed, espionage in general is closely related, both analytically and as a practical matter, to the specific places and things enumerated. Counter-espionage cannot be appreciably less related.

C. The trial court left to the jury the connection of the revealed information to the national defense. This was entirely proper. Whether petitioners object that the instructions on the necessary connection were not specific enough, or whether they insist it was a question of law alone, their contention is foreclosed by decisions of this Court. *Pierce* v. *United States*, 252 U. S. 239.

II

Whether or not petitioners were convicted under their own theory of Sections 1 (b) and 2 (a) of the Espionage Act, those provisions in fact punish obtaining and revealing information connected with "the national defense," unrestricted by the particular places and things enumerated in Section 1 (a).

A. The words of the statute are clear. No limitation such as petitioners urge is found in Section 1 (b) or 2 (a). "National defense" as used in Section 1 (a) would produce an absurd tautology if it were so restricted, and should not be more narrowly construed in Section 1 (b) or 2 (a). This is strongly indicated by the fact that Section 1 (b) uses an express cross-reference, as to purpose and intent, to Section 1 (a) when one is intended. The structure of the Act shows that a broad use of national defense is intended in Sections 1 (b) and 2 (a), where specific acts of obtaining or divulging information are punished, while a particularization of prohibited places is appropriate for Section 1 (a), which punishes simply going upon the place and looking about.

B. The legislative history is equivocal, but supports our construction at least as much as that of petitioners. Comparison with the Defense Secrets Act of 1911 shows our construction to be correct. The Senator in charge of the bill in terms declared that, of necessity, the "national defense" is a term broader than the enumeration of places found in Section 1 (a). The Espionage Act, so far as

material here, follows the Senate bill. But, it is true, the House conferees made a report, partially erroneous on its face, which in terms supports the petitioners' construction of Section 1 (b), although it inferentially supports our interpretation of Section 2. In these circumstances the legislative history is not a reliable guide to construction. *Federal Communications Commission* v. *Columbia Broadcasting System*, No. 39, this Term.

C. The evident purpose of the Espionage Act was to protect secret military and naval information. This purpose would be frustrated if petitioners' narrow construction were accepted.

D. Since the effect of Sections 1 (b) and 2 (a) is to protect information which, broadly speaking, is secret or confidential, and which is of a military nature, against disclosure for the purpose of injuring the United States or aiding a foreign nation, their terms need not be given an unwarrantedly narrow construction in order to protect the innocent.

E. The petitioners are obviously guilty of violating Sections 1 (b) and 2 (a) of the Espionage Act if the words "national defense" be given their ordinarily broad meaning.

III

A. A statute is unconstitutional "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning." *Connally* v. *General Construction Co.*, 269 U. S. 385, 391. The pre-

cept is exemplary, but is itself a rather indefinite standard. The decisions of this Court can neither be applied nor reconciled unless attention is paid to numerous *criteria* other than the generality of the statutory language alone.

B. At the outset it seems necessary to face the question whether petitioners can raise the doubts of others or only their own. (1) While most of the decisions of this Court have examined the statute on its face, this has never been done when the standing of the assailant to do so was challenged, and the better practice, occasionally followed, is to restrict the inquiry to the doubts of the particular assailant. *Fox* v. *Washington,* 236 U. S. 273, 277; *Miller* v. *Strahl,* 239 U. S. 426, 432, 433; *United States* v. *Wurzbach,* 280 U. S. 396, 399. (2) In the case at bar, whatever might be the peripheral doubts as to the meaning of "national defense," petitioners cannot claim that they were surprised by this application of the Espionage Act.

C. But even if a general inquiry be made on the face of Sections 1 (b) and 2 (a) of the Espionage Act, they are not unconstitutionally indefinite. (1) The language, it is true, is general; in some cases generic terms of equal indefiniteness have been held valid, in others invalid. Plainly other *criteria* must also be applied. (2) The general considerations include the operation of the presumption of validity, and the self-evident fact that countless statutes contemplate questions of degree, and are indefinite in their peripheries. *Nash* v. *United States,* 229 U. S. 373, 377; *United States* v. *Wurzbach,* 280

U. S. 396, 399. (3) The necessity of *scienter*, or the substantially equivalent reason to believe, before the penalties apply, together with the limitation that the revealed information must, broadly speaking, be confidential, is conclusive that the statute is not unconstitutional for want of definiteness. *Omaechevarria* v. *Idaho*, 246 U. S. 343, 348; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 501. This conclusion is corroborated by other factors applicable to the challenged provisions of the Espionage Act. "National defense" (4) is a term of common usage, and (5) is in any event easily understood by those affected. (6) Certainly the language could be made no more precise without weakening the statute. (7) There is no necessity of a prolonged investigation to determine the applicability of the statute, (8) any uncertainty as to its meaning does not affect innocent activity, and (9) there are strong reasons of policy for enacting the prohibition in the most effective terms.

IV

A. The evidence will not be reviewed here, but offers ample support for the verdict. (1) It is immaterial under the statute whether or not the revealed information was innocuous, so long as it was intended to be used to the injury of the United States or to the advantage of a foreign nation. (2) But, if it be material, the revealed information in point of fact was not innocuous.

B. Sections 1 (b) and 2 (a) punish the disclosure of information intended to be used for the advantage of a foreign nation, whether or not an injury to the United States is intended. The plain meaning of the statutory language is confirmed both by the legislative history and by the practical reasons for the prohibition.

C. There is no need to consider the conviction under the conspiracy count, since the sentence is concurrent with those on the other counts. *Brooks v. United States*, 267 U. S. 432, 441.

ARGUMENT

Petitioners advance a number of reasons why the decision below should be reversed: (1) Sections 1 (b) and 2 (a) of the Espionage Act, they say, make it a crime only to reveal information directly relating to the places specified in Section 1 (a). (2) If the term "national defense" has a broader denotation, those parts of the Act are unconstitutional. (3) The case should not have been left to the jury, because (a) the revealed information as a matter of law was too innocuous to injure the United States or advantage a foreign nation, and (b) whether or not the information related to the "national defense" was a question of law and not of fact. (4) The jury should have been instructed that "the advantage of any foreign nation" meant only its advantage as against the United States.

We contest each of these arguments. But several become irrelevant or unimportant when it is

considered that the petitioners were convicted under instructions which adopted their own theory of Sections 1 (b) and 2 (a) of the Espionage Act. We shall therefore, first show that petitioners cannot complain of the decision below, because they were convicted under their own theory, and thereafter deal with their specific contentions.

I

PETITIONERS WERE PROPERLY CONVICTED UNDER THE THEORY WHICH THEY URGE

A. THE TRIAL COURT ACCEPTED PETITIONERS' DEFINITION OF "NATIONAL DEFENSE"

Section 1 (a) of the Espionage Act punishes any one who, for the purpose of obtaining information respecting the national defense, and with intent or reason to believe that the information will be used to the injury of the United States or the advantage of a foreign nation, goes upon or otherwise obtains information concerning—

> any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense * * *.

Section 1 (b) punishes anyone who, with a similar intent, for the purpose of obtaining information concerning the national defense, copies, takes, or obtains any document, writing, or note "of any-

thing connected with the national defense." Section 2 (a) punishes anyone who, with a similar intent, communicates or delivers to a representative or citizen of a foreign nation any document, writing, or information "relating to the national defense." The circuit court of appeals held (R. 722–726) that "the national defense" as used in Sections 1 (b) and 2 (a) was not limited to the specific places enumerated in Section 1 (a). But, as the court noted (R. 726–727), the instructions of the district court adopted a contrary view, and limited "the national defense" substantially to the places enumerated in Section 1 (a). If this be the case, petitioners cannot complain of the broader construction adopted by the court of appeals, since they were convicted under their own theory.

1. The instructions of the district court define "national defense" in terms to which petitioners apparently do not object, apart from the freedom which the court allowed the jury (Br. 9, 59–61). The instructions defining "the national defense" are detailed (R. 429–434, 437, 438, 444). In brief, the court charged the jury that it included all things directly connected with the nation's defense against its enemies: men, ships, planes, forts, guns (R. 430), and also the secondary lines of defense: storage of reserves; communications of armed forces, transportation, and manufacture of war supplies (R. 430–431). Thus, as petitioners seem

to recognize (Br. 9, 59–60), the instructions limit the term "national defense" to the places specified in Section 1 (a) of the Espionage Act, and reflect the construction petitioners themselves urge.[1]

2. They protest, however, that this acceptance of their definition was negatived by the concluding portion of the charge relating to national defense, which left too much to the jury (Br. 9, 56–61). However, the trial court did not leave the definition of national defense to the jury, but only the *connection* of the revealed information to the national defense. It charged (R. 434):

> You are, then, to remember that the information, documents, or notes, which are alleged to have been connected with the national defense, may relate or pertain to the usefulness, efficiency or availablity of any of the above places, instrumentalities or things for the defense of the United States of America. The connection must not be a strained one nor an arbitrary one. The relationship must be reasonable and direct.

[1] The instructions specified "men" and "guns," neither of which is enumerated in Section 1 (a). But petitioners do not complain on this score.

They urge, it is true, that "the jury was guided into a realm of pure speculation," and quote two sentences from the court's charge (Br. 58). But those sentences are separated by 4 pages. The first sentence, which speaks of the national defense in general terms, is simply an introduction to the specific definition given by the court (R. 430). The second leaves to the jury not the meaning of "national defense" but the connection of the revealed information to the national defense (R. 434).

> Whether or not the information, obtained by any defendant in this case, concerned, regarded or was connected with the national defense is a question of fact solely for the determination of this jury, under these instructions.

This portion of the charge, which petitioners find objectionable, in no way qualifies the definition of national defense, which they find acceptable. While we think that the earlier portions of the charge, defining "national defense," unduly narrow the meaning of Sections 1 (b) and 2 (a) of the Espionage Act, this is an error which is favorable to petitioners. There is, therefore, no ground on which they can complain as to the construction of those sections which was adopted by the trial court.

Petitioners' objections, then, must be either (a) that there was no evidence to submit to the jury showing the connection or relationship of the revealed information to the national defense as acceptably defined (see Br. 55–56, 59, 61), or (b) that the question should not have been left to the jury at all, either because the instructions defining connection were inadequate (see Br. 58) or because the question is necessarily one of law (see Br. 61). We are not clear which of these objections petitioners press. We shall, therefore, answer each.

B. THE REVEALED INFORMATION COULD BE FOUND BY THE JURY TO RELATE TO THE NATIONAL DEFENSE AS DEFINED

The verdict of the jury was approved not only by the district court but also by the court below on petitioners' theory of the statute as well as on a broader interpretation of "national defense." This Court, therefore, will not review the adequacy of the evidence to support the verdict. *Delaney v. United States,* 263 U. S. 586, 589–590.

But even if the Court were to examine the evidence, it would find that the jury had before it ample evidence to support a conclusion that the information given by Salich to Gorin was connected with the components of the national defense which are specifically enumerated in Section 1 (a) of the Act. This is shown (1) by the direct relation to a few of the places specified in Section 1 (a), and (2) by the secondary connection with almost all of those places and things.

1. Section 1 (a) punishes those who with intent to injure the United States or advantage a foreign nation go upon or otherwise obtain information concerning—

> any * * * office, or other place connected with the national defense, owned * * * or under the control of the United States.

It cannot be doubted that the branch office of the Naval Intelligence located at San Pedro meets this

definition. The only arguable question under Sections 1 (b) and 2 (a) is whether the information given Gorin by Salich was "connected with" (Sec. 1 (b)), or was information "relating to" (Sec. 2 (a)), the Naval Intelligence office at San Pedro.

Salich gave Gorin information from at least 53 reports prepared by the Assistant Intelligence Officer (*supra*, pp. 9–10). Some of the information, at least, he could have obtained only by reading the carbons kept in the secretary's desk for the information of the investigators (R. 139–140). All of the information mentioned in the record was abstracted from or substantially duplicated the reports made in the course of his duties by the Assistant Intelligence Officer in the San Pedro office. Their cumulative information gave a very precise picture of an important part of the work of the San Pedro office: its attempted counter-espionage of Japanese agents. We do not see that a fair-minded jury could have concluded that this information had no connection with or relation to the San Pedro office of the Naval Intelligence. Certainly there was ample evidence to support its verdict that there was such a connection or relationship.

2. The same result is indicated if the issue be spread upon a larger canvas. Naval vessels and aircraft are, of course, included within the particularization of the national defense which is

found in Section 1 (a).[2] The issue on this point is whether information relating to foreign espionage or curiosity as to these things and places is connected with or relates to those things.

The great bulk of the reports from which Salich gave Gorin information relate to Japanese movements and activities, with the orienting emphasis upon suspected or probable espionage by Japanese agents (*supra*, pp. 10–11). Several of the reports refer specifically to Japanese observation of naval vessels[3] and aircraft.[4] Espionage, or suspected espionage, of naval vessels and of aircraft seems certainly to be an activity "connected with," or "relating to," those vessels and aircraft.[5] Information as to that espionage, or suspected espionage, as an analytical matter, seems by the same token to be information "concerning," "connected with," or "relating to" the vessels and aircraft.

The connection is also sufficiently close as a practical matter. The value of the armed defenses of the nation does not rest alone upon their number

[2] That subdivision speaks of "any vessel, aircraft * * * owned by the United States * * *."

[3] Report Nos. 560 (R. 273–274), 1081 (R. 269).

[4] Report Nos. 560 (R. 274), 1081 (R. 270).

[5] Report Nos. 480 (R. 290), 482 (R. 289) and 1081 (R. 269–270) deal with Japanese observation of oil refineries. The record, however, does not show whether any of these were operating under contract with the United States, and so it cannot be said that they are included within Section 1 (a).

and weight, but also upon the ignorance of foreign nations as to their methods of operation, their advantages, and their limitations. A secret weapon is far more valuable than a known weapon of otherwise equal power. The intricate web of espionage and counterespionage which this record suggests is ample demonstration that secrecy is a component part of any instrument of war.

If espionage is thus so closely related to the specific instruments of national defense, counterespionage cannot be far removed. A known espionage agent is of very limited value to his own government;[6] even a suspicion that a given individual is an espionage agent may be a useful defense against his activities.

There would, we believe, be little question that the information sold or given by Salich to Gorin related directly to the specific places and things enumerated in Section 1 (a) if the information had been placed at the disposal of Japan. In that case, it would be quite apparent that a foreign power had been given information which would enable it more effectively to uncover secret information as to the specific instruments of our national defense—the navy, the army, and the vital industries. And, so far as the character of the information is concerned, it is related as directly to the specific places and things enumerated in Section 1 (a) when it is

[6] See, for example, Address of Attorney General Jackson, New York State Bar Association, June 29, 1940, pp. 7–8.

given to the U. S. S. R. as when it is given to Japan.[7]

The jury, therefore, was entirely justified in a conclusion that the utility of specific instruments of war cannot be divorced from espionage, and that espionage cannot be separated from counter-espionage.

C. THE TRIAL COURT DID NOT ERR IN LEAVING TO THE JURY THE CONNECTION OF THE REVEALED INFORMATION TO THE NATIONAL DEFENSE, AS DEFINED

The instructions of the district court, as we have shown, defined national defense with particularity and in accord with petitioners' contentions. It did, however, leave to the jury the connection or relationship of the revealed information to the national defense. This, we submit, was entirely proper, as the court below held (R. 726).

1. The judge instructed the jury (R. 434):

> Whether or not the information, obtained by any defendant in this case, concerned, regarded or was connected with the national defense is a question of fact solely for the determination of this jury, under these instructions.

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[7] The fact that it was given to the U. S. S. R. and not to Japan may, however, bear upon the different questions whether it was too innocuous to warrant conviction (*infra*, pp. 92–98) and whether it is necessary under the Espionage Act that the information be used to the injury of the United States as well as to the advantage of a foreign nation (*infra*, pp. 98–102).

But they were not given blanket authority to devise any *criteria* they chose in order to determine the connection of the revealed information to the national defense. They were charged, in general terms, that (R. 434)—

> You are, then, to remember that the information, documents or notes, which are alleged to have been connected with the national defense, may relate or pertain to the usefulness, efficiency or availability of any of the above places, instrumentalities or things for the defense of the United States of America. The connection must not be a strained one nor an arbitrary one. The relationship must be reasonable and direct.

These general admonitions may well have been sufficient. But the preceding parts of the charge went further, and gave a more precise illustration of the requisite connection. Thus, the jury was instructed (R. 431–432):

> for purposes of prosecution under these statutes, the information, documents, plans, maps, etc., connected with these places or things must directly relate to the efficiency and effectiveness of the operation of said places or things as instruments for defending our nation. Thus a map of a mine-field would be a document directly affecting the usefulness of that mine-field, for if such map should fall into the hands of another country the ships of that power might easily pass

through the mine-field. Thus its usefulness as an instrument of national defense would be nullified as against that nation.

Similarly, even information that representatives or agents of some foreign power were in possession of such a map or plan or the map or plan of a shore battery, might likewise directly concern the usefulness of that mine field or that battery as an instrument of defense. Manifestly it might have to be rebuilt or changed. Such information might be essential to any successful naval strategy in that area during wartime.

The district court offered another illustrative example of the type of relationship or connection contemplated by the statute; it charged (R. 434):

> Thus a document narrating the fact that a certain foreign power has definite information as to the exact draught of our vessels might be vital to the military and naval defense of our country. For from the standpoint of military or naval strategy it might not only be dangerous to us for a foreign power to know our weaknesses and our limitations, but it might also be dangerous to us when such a foreign power knows that we know that they know of our limitations.

There can be no automatic measure of the precision with which a judge must instruct the jury on questions such as this. The ultimate inquiry must be only whether the jury was given sufficient guidance to determine what the statute means. Gram-

marians and rhetoricians might quarrel endlessly about the precise content of "connected with" or "relating to." One can doubt that any refinement of definition would make their meaning any more clear to juryman or attorney than the words carry in common usage. But if refinement be necessary, that offered by the district court seems unobjectionable. In substance he said: (1) foreign knowledge of the operation of instruments of war has a connection with those instruments; (2) so, too, knowledge of a foreign nation that we know of their knowledge of the limitations of our instruments of war is related to the operation of those instruments; and (3) the relationship must be reasonable and direct, not strained or arbitrary.

The general charge of the trial judge, even excluding the added particularity found in his illustrative examples of "connection" with the national defense, is at least as specific as the general instructions as to obstruction of the recruiting service (under Section 3 of the Espionage Act) found in the convictions approved by this Court. *Schenck* v. *United States,* 249 U. S. 47, No. 437, October Term, 1918 (R. 66–67); *Debs* v. *United States,* 249 U. S. 211, No. 714, October Term, 1918 (R. 269); *Pierce* v. *United States,* 252 U. S. 239, No. 234, October Term, 1919 (R. 204–205). We have found no closely analogous case in which this Court has in terms considered objections directed to the generality of the charge. But it has made it clear that the jury's

function in matters such as this must of necessity be performed with only general guidance from the Court. Thus, in *Acers* v. *United States*, 164 U. S. 388, 391, the defendant, convicted of assault with intent to kill, had struck the prosecuting witness with a stone. This Court held that the trial judge had properly left to the jury whether the stone was a "deadly weapon" under general instructions as to the nature of a "deadly weapon." Again, in *Dunlop* v. *United States*, 165 U. S. 486, the Court sustained very broad instructions defining "obscene" in a criminal prosecution.[8] Since the word "obscene" is a moderately technical one, ordinarily requiring at least some definition, it would seem clear that the charge in the case at bar defining "connection"—a word with no technical significance beyond its everyday meaning—was more than adequate.

2. It may be that petitioners urge that the question should not have been left to the jury at all, but that the judge should instead have given binding instructions as to whether the revealed information related to or was connected with the specific places

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[8] In his instructions the trial judge said (165 U. S. at 500):

"Now, what is (are) obscene, lascivious, lewd or indecent publications is largely a question of your own conscience and your own opinion; but it must come—before it can be said of such literature or publication—it must come up to this point: that it must be calculated with the ordinary reader to deprave him, deprave his morals, or lead to impure purposes. * * *"

and things enumerated in the charge as constituting the national defense. Either of two considerations shows that this argument, if it be made, is untenable.

In the first place, the result would be an almost revolutionary narrowing of the jury's function. It is probable that the petitioner's argument proceeds from the premise that, since the primary facts are not in dispute, it is the duty of the judge, as a matter of law, to determine the ultimate conclusion flowing from those facts. But it has been settled in a host of situations that the jury must find not only the primary facts but also the ultimate conclusion.*

* The most obvious field in which this is so is that of negligence law. Even though the primary facts be admitted, it is of course still a jury question whether those facts show negligence as that term is defined by the court. *Gunning* v. *Cooley*, 281 U. S. 90, 94. So, also, where the question is one of proximate cause, it is for the jury to draw the inference of causation even from undisputed facts. *Gila Valley R. R. Co.* v. *Hall*, 232 U. S. 94, 99–100. Other examples are the issues: whether admitted statements are defamatory, *Washington Post Co.* v. *Chaloner*, 250 U. S. 290, *Baker* v. *Warner*, 231, U. S. 588, 593–594; whether certain facts show insanity, *Queenan* v. *Oklahoma*, 190 U. S. 548; whether a combination "unduly" restricts competition or restrains trade within the meaning of the Sherman Act, *Nash* v. *United States*, 229 U. S. 373, 377; whether an instrument is a "deadly weapon," *Acres* v. *United States*, 164 U. S. 388; whether certain matter is "obscene," *Dunlop* v. *United States*, 165 U. S. 486; and whether certain conditions and facts describe a "cattle range," *Omaechevarria* v. *Idaho*, 27 Idaho 797, 807, affirmed, 246 U. S. 343.

The same question was raised in *Pierce* v. *United States,* 252 U. S. 239, where the defendants were convicted under Section 3 of the Espionage Act. The Court said [10] (252 U. S. at 250):

> Whether the printed words would in fact produce as a proximate result a material interference with the recruiting or enlistment service, or the operation or success of the forces of the United States, was a question for the jury to decide in view of all the circumstances of the time and considering the place and manner of distribution. * * *

The opinion cited as authority three other cases under the Espionage Act where the same conclusion was implicit in the decisions and opinions of the Court. *Schenck* v. *United States,* 249 U. S. 47, 52; *Frohwerk* v. *United States,* 249 U. S. 204, 208; *Debs* v. *United States,* 249 U. S. 211, 215. These cases are conclusive of the issue here.

In the second place, petitioners do not of course urge that the judge should have directed a verdict of guilty. Their contention then must be that the court should have instructed the jury as a matter of law that the revealed information was unconnected with the national defense as particularly defined in Section 1 (a) of the Act. In this view, their argument is simply that there was no evidence

[10] Justices Holmes and Brandeis dissented, but not as to the role of the jury. They concurred in the *Schenck*, *Frohwerk*, and *Debs* decisions, and dissented here on the construction of Section 3 and on the ground that there was no evidence to support the verdict.

of connection with the national defense to go to the jury. But, as we have shown, there was ample evidence to support such a conclusion.

II

THE ACT DOES NOT RESTRICT "NATIONAL DEFENSE" TO THE PLACES ENUMERATED IN SECTION 1 (a)

We have shown that petitioners were properly convicted under their own interpretation of Sections 1 (b) and 2 (a) of the Espionage Act: that those provisions are restricted to obtaining and revealing information relating to the places specified in Section 1 (a). But, whether or not this be the case, they are plainly covered by the statutory prohibitions if they be read, as they should, to punish obtaining and revealing information relating to the "national defense," unrestricted by the particularization of places and things found in Section 1 (a).

In the succeeding sections we shall show that: (a) the terms of the Act quite plainly do not limit "national defense" as used in Sections 1 (b) and 2 (a) to the particular places found in Section 1 (a); (b) the legislative history is equivocal, but supports our construction rather more than that of petitioners; (c) the legislative purpose would be frustrated by petitioners' construction; (d) the term "national defense" is not all-embracing, but must be read with several evident limitations; and (e) the petitioners' offense is obviously covered by the statute as so construed.

A. THE WORDS OF THE STATUTE

Section 1 (a) of the Espionage Act punishes anyone who, "for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation"—

> goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense. * * *

Section 1 (b) of the Act, set off from subsection (a) by a semicolon but not by a paragraph, punishes anyone who—

> for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts, or induces or aids another to copy, take, make, or obtain, any sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; * * *

Section 2 (a) of the Act, a wholly independent provision, punishes anyone who—

> with intent or reason to believe that it is to be used to the injury of the United States

> or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, * * * or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, * * *.

We submit that the term "national defense" cannot reasonably he read to mean only the twenty-four places specified in Section 1 (a). The provisions of Sections 1 (b) and 2 (a) concededly spell out no such limitation, and there can be no tacit or implied cross-reference to the particularization found in Section 1 (a). This conclusion is required both by the text and the structure of the Act.

1. Section 1 (a) concludes its specification of places by punishing those who go upon or otherwise obtain information concerning "any vessel, aircraft * * * *or other place connected with the national defense.*" Quite obviously "national defense" as used in Section 1 (a) is broader than the preceding particularization of places and things. Otherwise the terms would be a patent surplusage. It would be an absurd tautology for the draftsmen to have concluded its particulari-

zation with a generic term which meant simply that the particularization was to be repeated once more.

Since the term "national defense" has a broader meaning in Section 1 (a) itself than the enumerated places, it must have at least as broad a meaning in the other provisions of the Act.

2. Petitioners' insistence that there is an implied cross-reference in Sections 1 (b) and 2 (a) to the twenty-four places is contradicted by the general rule that the draftsman who intends a limitation by reference ordinarily says so. Indeed, in Section 1 (b) itself there is a clear example of the way to accomplish a cross-reference to Section 1 (a), for it punishes obtaining sketches or notes of anything connected with the national defense when done "for the purpose aforesaid, and with like intent or reason to believe." It is hardly to be thought that the draftsman who so carefully made his cross-reference in the adjectival phrase limiting the subject would fail to make a cross-reference, if any had been intended, in the adjectival phrase limiting the object.

As for Section 2 (a), there is not even a tenuous association with Section 1 (a). It is a separate section entirely, and is not even connected with semicolons. Congress even repeated in full the description of the necessary purpose and intent required both under Section 2 and Section 1 (a) and (b). Yet, if petitioners are correct, the term

"national defense" in Section 2 would have to be read as an unexpressed cross-reference to the specific places enumerated only in Section 1 (a).

3. The structure of the Espionage Act precludes the implied cross-reference upon which petitioners rely. In broad outline, Section 1 punishes obtaining confidential information relating to the national defense while Section 2 punishes its communication to foreign nations.[1] If the analysis stopped here, there might be thought to be no reason for differentiating Section 1 (a) from Sections 1 (b) and 2 (a). But a further break-down of Section 1 shows a very real distinction between Section 1 (a) and the other provisions. For Section 1 (a) is confined to observation as such; it contemplates going upon, or flying over, a vessel or aircraft and looking around. It punishes, in other words, simply observation or perception, when done with the requisite intent. There was, therefore, a very real reason to limit to a specified list the places where one could go and look about only at his peril.[2]

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[1] Other sections are irrelevant in this regard. Section 3 deals with disloyal statements and publications; Section 4 punishes conspiracies to violate Sections 2 or 3; Section 5 punishes harboring or concealing an offender under the Act; and Section 6 authorizes the President to expand the list of places specified in Section 1 (a).

[2] Thus, Section 6 authorizes the President by proclamation to "designate any place other than those set forth in subsection (a) of section one hereof in which anything for the use

But Sections 1 (b), 1 (c), 1 (d), 1 (e), and 2 (a) each deals with a concrete and specific act: copying a sketch or writing, receiving or giving away a document, losing a photograph through gross negligence, or delivering information to a representative of a foreign nation. They do not, as does Section 1 (a), refer to any *place* connected with the national defense; they speak instead of *anything* connected with the national defense, a considerably broader category. This is because the later subdivisions are directed not at the casual glance of the curious visitor but at the deliberate acts of one searching out and communicating secret information. There was, therefore, no occasion to embark upon a narrow and detailed specification of the types of forbidden *information,* even though in Section 1 (a) protection of the citizen might suggest a precise particularization of the *places* which could safely be visited only by the pure in heart.

In this view, the Act uses the term "national defense" in a wholly comprehensible manner. It is a generic concept of broad connotations, refer-

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of the Army or Navy is being prepared or constructed or stored as a prohibited place for the purposes of this title: *Provided*, That he shall determine that information with respect thereto would be prejudicial to the national defense."

That Section 6 speaks of "the purposes of this title" means no more than a reference to Section 1 (a) and to Sections 4, 5, and 8 which deal with the extent and sanctions of the Act.

ring to the military and naval establishments and the related activities of national preparedness. In Sections 1 (b) through 2 (a), there is no occasion to specify its content more narrowly, for the prohibited acts are specific. But in Section 1 (a) the forbidden act is simply going on the place and looking.[3] Congress therefore specified with care the places where one could not look with a guilty intent. In that subdivision, it used the term "national defense" not to define the forbidden act, which is going on a specified place and observing what is there, but instead to limit the extent of the prohibition: (a) the forbidden purpose is "obtaining information respecting the national defense," and (b) the "other place" owned, constructed, or controlled by the United States must be "connected with the national defense."

B. THE LEGISLATIVE HISTORY

The language of the statute, as we have shown, is plain enough. The legislative history of the Espionage Act, on the other hand, is highly confused. We think that it can safely be used only against the full background of the legislative proceedings out of which the Act grew.

[3] The added prohibition "or otherwise obtains information" is, of course, a catch-all which might in some circumstances make subdivision (a) coextensive with the subsequent subdivisions. It was added by the Conference Committee and did not appear in the earlier versions of the bill. See Appendix B, *infra*, pp. 111, 116.

Prior to the passage of the Espionage Act of 1917 the only federal law punishing espionage activities in time of peace was the Defense Secrets Act of 1911 (Act of March 3, 1911, c. 226, 36 Stat. 1084). This Act was declared to be inadequate by the Attorney General in his report for the year 1916. (Report of Attorney General for 1916, p. 19.) The Attorney General submitted to Congress a proposed revision of the Act of 1911. His suggestions, made after consultation with the Army and Navy departments, resulted in S. 8148 being introduced in the 64th Congress.

S. 8148 was reported to the Senate, with amendments, by the Senate Committee on the Judiciary of which Senator Overman was chairman (54 Cong. Rec. 2819). After debate, it passed the Senate (54 Cong. Rec. 3665). It then went to the House Committee on the Judiciary (54 Cong. Rec. 3782), which reported it with further amendments (54 Cong. Rec. 4563). No further action was taken in the 64th Congress. It was revived in the 65th Congress, however, as chapter 2 of S. 2; this, through incorporation into H. R. 291, became, after amendments, the Espionage Act of 1917. See 55 Cong. Rec. 778.

1. *Comparison with 1911 Act.*—Before undertaking to follow through the rather considerable legislative history of the Espionage Act of 1917, it is instructive to compare its terms with those of

the Defense Secrets Act of 1911 (c. 226, 36 Stat. 1084), upon which it is obviously modeled.[4]

The second clause of Section 1 of the 1911 Act forbids obtaining information with respect to the national defense by anyone "upon any vessel, or in or near any such place." This clause restricted

[4] The revelant provisions of the 1911 Act are:

"That whoever, for the purpose of obtaining information respecting the national defense, to which he is not lawfully entitled, goes upon any vessel, or enters any navy yard, naval station, fort, battery, torpedo station, arsenal, camp, factory, building, office, or other place connected with the national defense, owned or constructed or in process of construction by the United States, or in the possession or under the control of the United States or any of its authorities or agents, and whether situated within the United States or in any place noncontiguous to but subject to the jurisdiction thereof; or whoever, when lawfully or unlawfully upon any vessel, or in or near any such place, without proper authority, obtains, takes, or makes, or attempts to obtain, take, or make, any document, sketch, photograph, photographic negative, plan, model, or knowledge of any thing connected with the national defense to which he is not entitled; or whoever, without proper authority, receives or obtains, or undertakes or agrees to receive or obtain, from any person, any such document, sketch, photograph, photographic negative, plan, model, or knowledge, knowing the same to have been so obtained, taken, or made; or whoever, having possession of or control over any such document, sketch, photograph, photographic negative, plan, model, or knowledge, willfully and without proper authority, communicates or attempts to communicate the same to any person not entitled to receive it, or to whom the same ought not, in the interest of the national defense, be communicated at that time; or whoever, being lawfully intrusted with any such document, sketch, photograph, photographic negative, plan, model, or knowledge, willfully and in breach of his trust, so

the operation of the second clause to persons upon the places and things enumerated in the first clause. Its omission from the corresponding provisions of Section 1 (b) of the 1917 Act must have been deliberate, and shows that Section 1 (b) is not to be limited, as was the corresponding second clause of the 1911 Act, to the places enumerated in Section 1 (a).

2. *Action in the 64th Congress.*—The bill considered in the 64th Congress was S. 8148.[5] It was patterned on the 1911 Act, as was explained by Senator Overman (54 Cong. Rec. 3590). So far as concerns the construction to be given "national defense," S. 8148 differs in no substantial respect from the Espionage Act as finally enacted.

In the course of the debate, Senator Overman, who was in charge of the bill, made it plain that "other place connected with the national defense," as used in Section 1 (a), is broader than the enumerated places. An amendment was offered to strike out these words, in order that the prohibited places might be restricted to those enumerated (54

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communicates or attempts to communicate the same, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both.

"SEC. 2. That whoever, having committed any offense defined in the preceding section, communicates or attempts to communicate to any foreign government, or to any agent or employee thereof, any document, sketch, photograph, photographic negative, plan, model, or knowledge so obtained, taken, or made, or so intrusted to him, shall be imprisoned not more than ten years."

[5] S. 8148 is set in Appendix B, *infra*, pp. 111–116.

Cong. Rec. 3599–3600). Senator Overman urged its defeat because (54 Cong. Rec. 3601):

> No Senator knows what are these plans or what specific articles are in some buildings that ought to be protected, and we made it general to protect everything connected with the national defense.

The Amendment was defeated (54 Cong. Rec. 3601). Plainly enough, if the term in Section 1 (a) is broader than the enumerated places, so is it in Sections 1 (b) and 2 (a).

The bill, S. 8148, then went to the House Committee on the Judiciary (54 Cong. Rec. 3782), which reported it with amendments irrelevant here (54 Cong. Rec. 4563; see H. Rep. No. 1591, 64th Cong., 2d Sess.) No further action was taken in the 64th Congress.

3. *Action in the 65th Congress.*—The bill, in the form reported by the House Committee in the 64th Congress, was introduced into the 65th Congress as the espionage chapter of S. 2 (55 Cong. Rec. 155).[6] S. 2 was sent to the Judiciary Committee of the Senate (55 Cong. Rec. 155), which reported it favorably with certain amendments, unimportant here (55 Cong. Rec. 769).

S. 2 was then debated in the Senate as in the Committee of the Whole and the espionage chapter was adopted (55 Cong. Rec. 776–794, 831–849, 871–891).

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[6] S. 2, as reported out by the Judiciary Committee, is reprinted in Appendix B, *infra*, pp. 116–121.

The whole debate, with inconsequential exceptions, was devoted to Section 2 (c), the "censorship" provisions, authorizing the President to issue regulations forbidding anyone to elicit "information related to the public defense or calculated to be, or which might be, directly or indirectly, useful to the enemy." The term "public defense" was criticized as permitting the President to specify and forbid information about any aspect of our national life (e. g., 55 Cong. Rec. 876, 877). At this stage the criticisms were unavailing.[7]

During debate on the other chapters of S. 2, in the Committee of the Whole, word was sent that the House had passed H. R. 291, which likewise dealt with espionage (55 Cong. Rec. 1849). H. R. 291 was then referred to the Senate Committee on the Judiciary (55 Cong. Rec. 1861). It was reported, with an amendment; the amendment proposed to strike out all after the enacting clause and inserted, instead, the provisions of S. 2, as amended, up to that time, in the Senate as in Committee of the Whole (55 Cong. Rec. 2014). Under unanimous consent, the Senate, as in Committee of the Whole, then proceeded to consider H. R. 291, which, as thus amended, incorporated the provisions of S. 2 (55 Cong. Rec. 2014, 2016, 2055).

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[7] An amendment, by Senator Cummins, to limit the power of the President to make regulations to the movement of the armed forces and plans of operation, was defeated (55 Cong. Rec. 886). And Senator Thomas' amendment, to strike Section 2 (c), was likewise defeated (55 Cong. Rec. 887).

There was no further debate in the Committee of the Whole touching directly upon Section 1 (a) and (b). But Section 2 (c), the censorship section, was severely criticized (55 Cong. Rec. 2097–2102, 2109–2111) and an amendment (55 Cong. Rec. 2111–2122) to strike out all of subsection (c) was agreed to (55 Cong. Rec. 2166). Debate continued on other chapters of the bill,[8] and it was adopted and a conference requested (55 Cong. Rec. 2167–2196, 2241–2262, 2265–2270, 2271).

Thus the task of the conferees was essentially that of reconciling S. 2 and H. R. 291. The former was quite similar to the Act of 1911 and to the Espionage Act as adopted. H. R. 291, on the other hand, followed a rather different pattern.[9] It combined Sections 1 (a) to 1 (c) of the Senate version into simpler prohibitions against getting or disclosing information concerned with the national defense. There was no enumeration of forbidden places comparable to Section 1 (a); indeed, there was no prohibition of "going upon," etc., any place. It used the term "national defense" both in its prohibition against obtaining and disclosing information and in its censorship provisions. And, in Section 1202, it defined "national defense," for the

[8] Senator Overman offered a modified censorship section, 2 (c), known as the Cummins amendment, and similar to the amended section stricken before. 55 Cong. Rec. 2262. It was rejected. 55 Cong. Rec. 2265.

[9] The relevant provisions of H. R. 291 as it passed the House are set out in Appendix B, *infra*, pp. 121–124.

purpose of all titles of the Act, in broad terms, to include substantially every person, place, or thing having to do with the military or naval defense or security of the nation.

The House managers, in their statement, explained that the Senate bill was "the basis of their final agreement." [10] So far as concerns the meaning of "national defense," the conferees made no material change from the Senate bill in Sections 1 and 2.[11] Section 1202 of the House bill, defining national defense in broad terms, was eliminated.[12]

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[10] They explained the conference work as follows (55 Cong. Rec. 3129):

"The conferees took up the Senate amendment and made it the basis of their final agreement. Some of the sections were agreed to as written, others were amended so as to embody provisions contained in the House bill, or sections from the House bill were substituted for them, and in a few instances sections were rewritten in conference in order to harmonize the views of the two Houses.

[11] In Section 1 (a) there was added to the words "goes upon, enters, flies over" the further phrase "or otherwise obtains information concerning."

[12] In addition, the conferees eliminated from Section 6 the provision giving the President power "in time of war or in case of military necessity to designate any matter, thing, or information belonging to the Government or contained in the records or files of any of the Executive Departments, or of other Government offices, as information relating to the national defense, to which no person (unless duly authorized) shall be lawfully entitled within the meaning of this chapter." It should be noted, however, that S. 2 and the final bill reported by the Conference both authorized the President "in time of war or in case of military necessity" [the final draft reads "national emergency"] to "designate any place other than those set forth in paragraph [subsec-

No other change material to the present issue was made.[13] It is evident, therefore, that the bill as passed was in this respect substantially the Senate bill. Yet the House managers stated:

> The several provisions under this title in the conferees' report do not materially change the provisions of this title as passed by the House. Section 1 sets out the places connected with the national defense to which the prohibitions of the section apply while the similar provision of the House bill designates such places in general terms.
>
> * * * * *
>
> Section 7 [Section 6 of the Act] was not in the House bill but was taken from the Senate amendment. It was adopted because of the changes made in section 1, and for the further reason that section 1202 of the House bill, which gave the words "national defense" a broad meaning, was stricken out.

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tion] (a) of section one hereof in which anything for the use of the Army or Navy is being prepared or constructed [the final draft added "or stored"] for the purposes of this chapter." The exercise of power, under both S. 2 and the conference bill, was conditioned on a finding that "information with respect thereto would be prejudicial to the national defense."

[13] A section containing modified censorship provisions was added to the Senate bill in Conference (55 Cong. Rec. 3130). The House, however, voted to recommit the bill to Conference with instructions to delete the censorship provision (55 Cong. Rec. 3145). When this was done, the second Conference Report (S. Rept. No. 44, H. Rep. No. 69, 55 Cong. Rec. 3259, 3266) was agreed to (55 Cong. Rec. 3440, 3492, 3301–3307).

It is this statement of the House conferees, together with a similar statement made on the floor of the House,[14] upon which petitioners place their chief reliance (Br. 28–33). We recognize that these excerpts offer weighty support to petitioners, but insist that the statement simply does not reflect what Congress or the conferees in fact did: (1) Section 1 of H. R. 291 did *not* designate in general terms "the *places* connected with the national defense to which the prohibitions of the section apply," for, in contrast to Section 1 (a) of S. 2, it made no provision whatever as to forbidden places. (2) The House managers implied that Section 6 of the Act was taken in conference from the Senate bill (note 12, *supra*, pp. 49–50) because of changes made in Section 1 of H. R. 291 and the elimination of Section 1202, broadly defining national defense. But no changes material here were made in Section 1 of S. 2; Section 6 of the Act had always been in the Senate bill; and that bill contained no definition comparable to Section 1202 of H. R. 291. In short, so far

[14] Mr. Webb said (55 Cong. Rec. 3131):

"Mr. Speaker, the managers of the conference on the part of the House have tried to perform their duty with respect to this difficult bill conscientiously and effectively, and, generally speaking, I may say that the bill presented to you today is practically the bill as it passed the House. The only changes that have been made worth mentioning are in the espionage section proper, and there we agreed as to the particular designation of what matters should not be entered upon or flown over, instead of the "national defense" as a general description * * *.

as material here, the House simply accepted the Senate version without significant change.

The statement of the House managers, then, on its face reflects a misunderstanding of Section 1 of H. R. 291 and explains the adoption by the conferees of S. 2 in terms which have no relation to the Senate's action. Under these circumstances, it is doubtful that the statement should be taken as reflecting the views of the House, and it is quite plain that it should not be thought to represent the understanding of the Senate. For the Senate, as we have shown (*supra,* pp. 111–121), viewed the term "national defense" as used in S. 8148 and S. 2 as broader than the places enumerated in Section 1 (a), and no material change was made from these bills by the Conference Committee.

Finally it may be noted that even if one were to accept the statement of the House managers as the ultimate touchstone of the Congressional intent, it is doubtful that petitioners could escape the provisions of Section 2 (a). The managers said (55 Cong. Rec. 3130):

> Section 2 of the House bill made the person guilty for doing the things enumerated therein "with intent or knowledge, or reason to believe that it is to be used to the injury of the United States." Under section 2 (a) as agreed upon, this provision is made to read, "with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation."

Section 2 of H. R. 291, as does Section 2 (a) of the Act, forbade communication of information "relating to the national defense" to representatives of a foreign government. But H. R. 291 contained no enumeration of places and things comparable to Section 1 (a) of the Act, so that it would be impossible to argue that the term "national defense" was limited in H. R. 291 to that particularization. Yet the House managers clearly indicate that Section 2 (a) differs from Section 2 of H. R. 291 only in the intent required.

In summary, the legislative history of the Espionage Act in the Senate would indicate that our construction of the Act is correct; the statement of the House managers would indicate that petitioners are correct as to Section 1 (b) and would suggest that we are correct as to Section 2 (a). Under these circumstances, it would seem plain enough that the legislative history is too confused to warrant departure from the plain terms of the Act.[15] As this Court said in *Federal Communications Commission* v. *Columbia Broadcasting System*, Nos. 39–40, this Term:

> What was said in Committee Reports and some remarks by the proponent of the measure in the Senate are sufficiently ambiguous, insofar as this narrow issue is concerned, to

[15] In the House and in the Senate the debate was directed chiefly at the censorship provisions of the bills, which were finally eliminated before enactment. The numerous objec-

> invite mutually destructive dialectic but not strong enough either to strengthen or weaken the force of what Congress has enacted. * * *

We do not urge, because the language of the statute is plain, that the Court should not look at the legislative history. See *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 543–544; *United States* v. *Dickerson*, 310 U. S. 554, 561–562. But assuredly, the plain meaning of the statutory language should not be warped to conform with one of the two contradictory sets of inferences which may be drawn from the legislative history when it is equally compatible with the other group of inferences.

4. *Subsequent Legislation.*—The intention of Congress when it enacted the Espionage Act of 1917 is not illumined by any subsequent legislation. The Act of January 12, 1938 (c. 2, 52 Stat. 3, 50 U. S. C., Supp. V, Sec. 45) provides that, whenever,

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tions to the breadth of "national defense" as used in those provisions, which contained no requirement of *scienter*, have no application here. Mr. La Guardia, for example, specifically distinguished between that section and the remainder of the bill (55 Cong. Rec. 1700), as did Mr. Walsh (55 Cong. Rec. 1601). Mr. Graham likewise stated: "But the Committee has carefully guarded innocent people who might communicate, who might obtain a photograph of some public work connected with the defense of the country, from being held liable for a criminal act, because the Government must prove affirmatively * * * that the person obtaining it had a guilty purpose, to wit, to injure the United States. Now, that applies to the first two sections" (55 Cong. Rec. 1717–1718, 1756).

in the interests of national defense, the President shall—

> define certain vital military and naval installations or equipment as requiring protection against the general dissemination or information relative thereto,

it shall be unlawful to take pictures or other graphic representations of such installations or equipment without the permission of the commanding officer. It also requires such pictures and representations to be submitted to censorship before publication. A letter from the War and Navy Departments to the Senate Committee on Military Affairs, with respect to this bill, states (S. Rep. 108, 75th Cong., 2d Sess.) that the purpose of the bill is to—

> permit more effective control of the activities of free-lance motion-picture and still-picture operators in vital military and naval installations, where the intent of the photographer is not necessarily so flagrant as that contemplated under section I, Public, No. 24, Sixty-fifth Congress, "Espionage Act."

It is plain enough that the War and Navy Departments recommended the legislation simply to permit control of photographers who had no guilty intention to injure the United States or aid a foreign nation. The House Committee report is less explicit, but seems to agree on the bill's purpose.[16]

[16] It reported (H. Rep. 1650, 75th Cong., 2d Sess.):

"The Committee is of the opinion that this measure is necessary to prevent important facts regarding our national

The Chairman of the Military Affairs Committee, on the floor of the House, offered a different explanation, but it does not aid petitioners."

The Act of March 28, 1940 (Pub., No. 443, 76th Cong.), increases the penalties for violation of the Espionage Act but does not change its substantive provisions.

C. THE LEGISLATIVE PURPOSE

It needs but a word to demonstrate that petitioners' construction would frustrate or seriously impair the accomplishment of the Congressional purpose. This Court has often given effect to the "presumption against a construction which would render a statute ineffective or inefficient." *Bird* v. *United States,* 187 U. S. 118, 124; *United States* v. *Powers,* 307 U. S. 214, 217. There is at least an equal reason to do so here.

The revision of the Defense Secrets Act of 1911 was proposed because that Act was "incomplete and defective" (Report of Attorney General for

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defense installations from falling into the possession of persons who, through ignorance of their significance, or hostile intent, would permit them to be used to the detriment of the United States."

[17] In response to questions regarding the necessity for this legislation, he explained that the purpose of the bill was to extend the law to territorial possessions outside the United States and to provide penalties not imposed under existing legislation. 83 Cong. Rec. 70–72. In both respects, it would seem, he was mistaken.

The Senate adopted the bill without debate. 83 Cong. Rec. 75; 81 Cong. Rec. 1133, 1396, 1534.

1916, p. 19.) There can be no doubt that Congress in 1917 intended to cover the espionage field completely. Cf. *Pierce* v. *United States*, 252 U. S. 239, 252. Yet an army rifle, to choose one of countless examples, is not included among the items specified in Section 1 (a). It is not a "place" that someone can go upon, enter, or fly over. Yet no one would doubt that the plans of such a rifle would be one of the most valuable of defense secrets, or that the language of Section 1 (b), referring to an "instrument * * * connected with the national defense," is unequivocally appropriate to prevent obtaining secret information about it. Information concerning the "movement, numbers, description, condition, or disposition of any of the armed forces * * * or war materials" or "plans or conduct, or supposed plans or conduct of any naval or military operations" is deemed so vital that gathering it for the enemy in time of war is made a capital offense by Section 2 (b) of the Act. But under the petitioners' construction all of this information could be betrayed with impunity so long as we were technically at peace, since they are not places enumerated or susceptible of enumeration in Section 1 (a).

Congress, as Senator Overman pointed out (*supra*, p. 46), could not make an intelligible specification of the thousands of items and activities which comprise the national defense. Even if the list were somehow made complete at the date of enactment, the progress of military and

naval science would soon make it obsolete. Indeed, the secrets of greatest value, because they related to the newest military inventions, would be those most likely to fall outside any detailed specification which Congress might choose to adopt. This very difficulty was the occasion for the revision of the Defense Secrets Act of 1911, resulting in the Espionage Act of 1917, and it was in the minds of legislators who were responsible for the passage of the latter act. (54 Cong. Rec. 3601, 55 Cong. Rec. 1606.)

D. LIMITATIONS UPON THE STATUTE

Sections 1 (b) and 2 (a) of the Espionage Act, then, punish anyone who, with intent to injure the United States or aid a foreign nation, obtains and discloses to a representative of a foreign nation information connected with or relating to "the national defense."

It may be appropriate here to point out that the statute does not punish the obtaining and disclosure of all information which might be thought to bear on the manifold activities, military and industrial, which comprise the national defense. Instead, the Act contains by its terms or by its plain implications three limitations upon its application: (1) The information must be obtained or revealed with the intent or reason to believe that it will be used to the injury of the United States or to the advantage of a foreign nation. (2) The information must have a military significance. (3) It must be secret or confidential information, either be-

cause it is derived from confidential sources or because it presents information outside the public domain which plainly should not be placed at foreign disposal. The first of these limitations is express; the second and third deserve a word of comment.

Section 1 (b) punishes obtaining—

> any sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; * * *

Section 2 (a) punishes the disclosure to a representative of a foreign nation of—

> any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, * * *

Implicit in these enumerations is a connecting thread of similarity. They refer to matters of military or naval significance. Moreover, the Act, as its title shows, is directed not at curiosity but at "espionage." The documents, plans, and information are matters which can be secured only if one "copies, takes, makes, or obtains" (Sec. 1 (b)), and are disclosed only if one "communicates, delivers, or transmits" them to a representative of a foreign government (Sec. 2 (a)). The statute, then, is cast in terms which assumes that the protected information is not of common knowledge,

and lies outside the public domain. In a broad sense, it protects military information which is secret or confidential. Its secret nature may arise from the fact that it is held confidential by the Government, or from the fact that through independent investigations the offender has secretly accumulated data which has a military importance such that it should not be placed at the disposal of a foreign nation. The Act, then, quite plainly is directed at espionage, not at innocence.[18]

This construction is required also by the legislative history of the Act. Senator Cummins, who bore the burden of the opposition, pointed out that the bill did not in terms refer to "secrets" or to "spies." 54 Cong. Rec. 3489. But, in discussing and explaining Sec. 1, Senator Overman, in charge of the bill, repeatedly stated that it was intended to cover only "secrets" of our national defense and to punish spies. E. g., 54 Cong. Rec. 3489, 3586. He frequently referred to military places, or to places in which military plans, codes, and signals are kept. E. g., 54 Cong. Rec. 3600. The House debates disclose the same purpose.[19]

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[18] Thus the newspaper correspondent whose dispatches relate military but not confidential information does not fall afoul of the Act. And the army officer who, on direction of his superiors, shows the purchasing officers of a foreign nation a new weapon is similarly protected: the information is not secret as against those to whom disclosure is authorized.

[19] It was argued that the prescribed intent in Section 1 should be confined to military injury (55 Cong. Rec. 1591, 1759). Mr. Webb replied that "the courts would proba-

In short, the phrase "information connected with the national defense" as used in the context of the Espionage Act means, broadly, secret or confidential information which has its primary significance in relation to the possible armed conflicts in which this nation might be engaged. The protected information is readily recognized from the common experience and knowledge of the average man. Like all tests based upon such experience, its application to a given state of facts sometimes may involve the use of judgment. But that judgment seems plainly to be no more difficult than the inevitable difficulty, common to almost all statutes, of drawing a border-line at the periphery. See *Nash* v. *United States,* 229 U. S. 373, 377; *United States* v. *Wurzbach,* 280 U. S. 396, 399. Finally, all danger of entrapping the innocent is removed

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bly construe" Section 1 so as to relate only to military offenses (55 Cong. Rec. 1591). Again, when the word "military" was sought to be inserted before "injury", Mr. Webb stated that Section 1 is as "nearly confined to that as it is humanly possible to make it" (55 Cong. Rec. 1759). And, when it was urged that Section 3 covered even a plan of an ordinary building, Mr. Webb replied: "I would say to my friend that my interpretation of the provision is that it would not cover the building of a house somewhere in a fort. It would be the fort itself, the things that are vitally connected with the national defense, a book or a photograph which would give the enemy the tunnels, the location of the guns, and things like that, and not the building of a house by a poor mechanic somewhere * * * we ought to make it imperative on the officers of this Government to preserve with a scrupulous care every one of these profound and important national secrets involving our military and national existence" (55 Cong. Rec. 1762).

by the requirement that the information be obtained or revealed with the intent or reason to believe that it will be used to the injury of the United States or to the advantage of a foreign nation.

E. THE REVEALED INFORMATION RELATED TO THE NATIONAL DEFENSE

Petitioners urge that the revealed information as a matter of law was too innocuous to warrant conviction; this point we discuss below (pp. 92–98). But, as we read their brief (see pp. 15, 17), they do not argue that the information Salich obtained in the course of his investigatory duties and from the files of the Naval Intelligence was unrelated to, or was not connected with, "the national defense," if the term be understood as we urge it should be construed.

This Court, in any event, will not review the evidence to determine if it supports the verdict of the jury (*supra,* p. 25). If it were to do so, it would find that the revealed information quite plainly was connected with the national defense, as so defined.

The preceding section of this brief suggested that the term is not to be read in its broadest connotations, but is to be limited to secret or confidential information of military significance. The petitioners are not aided by this implied limitation upon the scope of the statutory prohibition.

Salich gave Gorin information, which he knew to be highly confidential, drawn from some 53 Naval

Intelligence reports; the information presented a full picture of the work of the Naval Intelligence office at San Pedro so far as it was directed toward protection against Japanese espionage. The information disclosed the names and activities of suspected Japanese spies, and discussed rumored Japanese military or sabotage inventions. Gorin was thus given both information as to Japanese espionage and a rather good picture of our counter-espionage activities (*supra,* pp. 10–11, 26–28).[20]

Espionage and counter-espionage obviously lie at the heart of our national defense. It is self-evident that Japanese espionage, and American counter-espionage, are connected with or related to "the national defense" under any ordinary or usual interpretation of those words.

III

SECTIONS 1 (b) AND 2 (a) ARE NOT UNCONSTITUTIONAL BECAUSE THEY PUNISH THE DISCLOSURE OF INFORMATION RELATING TO THE NATIONAL DEFENSE

We have urged (1) that petitioners were convicted under their own theory of Sections 1 (b) and

[20] Petitioners sought to introduce into evidence an article from the April 7, 1938, issue of *Ken* magazine (R. 485–513). This article, together with two in later issues of the magazine (April 6, 1939, and July 27, 1939), related matter more or less equivalent to the information contained in the reports revealed by Salich, and other material of the same general nature. But much of the information given Gorin was never made a part of the public domain in any manner (R. 717, 734).

2 (a) of the Espionage Act, and (2) that, in any event, those sections punish the disclosure of information connected with the "national defense," without limitation to the particular places specified in Section 1 (a). If we are wrong on the first argument, and right on the second, the constitutionality of Sections 1 (b) and 2 (a), as thus construed, is attacked by petitioners on the ground that the term "national defense" is unduly vague and indefinite (Br. 38–49). We assume that this argument is open to both petitioners,[1] but deny their conclusion.

A. THE RULE AGAINST INDEFINITENESS

It is clear enough, at least at this time, that a statute may be unconstitutional because it speaks in language too indefinite to be understood.[2] Whatever the specific legal basis for this limita-

[1] Petitioner Gorin raised his constitutional objections at every necessary point (R. 13–14, 15–16, 17–18, 69–70, 459, 631). Petitioner Salich did not raise the constitutional objection at any point in the trial court or in his notice of appeal or assignments of error to the court below. But we doubt that this should prevent him from raising the legal question here. The court below passed on the question with respect to both petitioners. The Government's case in the evidence was not affected. Cf. *Mosbacher* v. *United States*, No. 128, this Term, certiorari granted and judgment reversed, November 18, 1940, on a ground not urged below. Finally, it would seem unnecessarily harsh to convict Salich under a statute held unconstitutional as to Gorin. Cf. *Patterson* v. *Alabama*, 294 U. S. 600.

[2] It was not so clear a generation ago. In *United States* v. *Brewer*, 139 U. S. 278, 288 (1891), the Court was content with the simpler proposition that if an act was too vague for

tion,[3] its roots reach deep into cherished soil—the legislature must deal fairly with the people. It cannot exact "obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." *Champlin Refining Co.* v. *Commission,* 286 U. S. 210, 243. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta* v. *New Jersey,* 306 U. S. 451, 453. A "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.,* 269 U. S. 385, 391.

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a man to know whether or not he violated its prohibition, then he was not within its terms. And in *Lloyd* v. *Dollison,* 194 U. S. 445, 450 (1904), Mr. Justice McKenna, writing for a unanimous Court, indicated a real doubt that the due process clause carried any prohibition against indefiniteness: "if a case can exist in which the kind or degree of power given by a State to its tribunals may become an element of due process under the Fourteenth Amendment, it would have to be a more extreme example than the Ohio statute. * * * Besides, would it not be strange to hold that a statute unaccompanied by a glossary of its terms leaves unfulfilled the legislative power?" Apparently the first explicit recognition by this Court of a constitutional limitation was in *Waters-Pierce Oil Co.* v. *Texas (No. 1),* 212 U. S. 86, 108–111. (1909). Not until *International Harvester Co.* v. *Kentucky,* 234 U. S. 216 (1914), did the Court hold a statute invalid on this ground.

[3] The source of the constitutional prohibition is occasionally found in the Sixth Amendment, requiring that the accused "be informed of the nature and cause of the accusation." *United States* v. *Cohen Grocery Co.,* 255 U. S. 81,

None would quarrel with these general precepts. On the other hand, it is far from easy to give them definite content or specific application.[4] Their inherent vagueness has not been removed by any crystallized or precisely articulated course of decision in applying these criteria. The court below not inaccurately commented that these general rules "are subject to the same mischief which they seek to control, and do not aid in the solution of the question" (R. 728). It then summarized nine cases in which this Court had sustained statutes against complaints that they were too indefinite and six cases in which the statute had been condemned, and concluded that "no workable statement of differentiation is apparent from these decisions" (R. 728-731).

We agree with the court below only in part. The ultimate inquiry is simply whether the statutes offend seriously against accepted notions of fair dealing. That inquiry by its nature cannot be answered in a sentence, nor by isolating the crucial phrase of the statute and measuring its specificity against the calibration found in the precedents.

89; *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 518. It is more frequently, and perhaps more persuasively, placed upon the due process clause. E. g. *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453; *Connally* v. *General Construction Co.*, 269 U. S. 385, 391; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 458.

[4] Cf. Note, *Indefinite Criteria of Definiteness in Statutes*, 45 Harv. Law Rev. 160.

Unless one were to set up multiple equations of prodigious complexity, it is folly to attempt to "reconcile" the thirty-odd decisions of this Court which have considered the question. Each is a value judgment, based upon the existence and weight of numerous factors. No analysis of the precedents, we believe, can be fruitful except that which attempts to isolate those factors and to apply them to the issue at hand. Some factors, such as the generality of the language or the requirement of *scienter*, will be found to be more important than others, but, as the court below discovered, the results are wildly confused if interpreted in terms so rudimentary as the generality of the statutory language alone.

The succeeding sections of this point attempt to isolate the relevant factors and to apply them to the case at bar. When this is done, we submit that it is abundantly clear, upon reason and precedent alike, that Sections 1 (b) and 2 (a) of the Espionage Act are constitutional.

B. PETITIONERS CAN RAISE ONLY THEIR OWN INSUBSTANTIAL DOUBTS

At the outset, the Court seems to be faced with a preliminary matter: the standing of petitioners to complain of the indefiniteness of Sections 1 (b) and 2 (a) of the Espionage Act as it covers the activities of people generally. This question, in contrast to the constitutionality of the provisions on

their merits, is doubtful. But, since the scope of the inquiry differs markedly according as it is directed to the statute generally or to its application to petitioners, we prefer to face it squarely.

1. *None Has Standing to Complain of Indefiniteness Except as the Statute is Applied to Him.*— The question is clear on principle. A statute may be invalid as applied to one set of facts and valid as applied to another. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Wynne*, 224 U. S. 354; *Kansas City Southern Ry. Co.* v. *Anderson*, 233 U. S. 325; *Poindexter* v. *Greenhow*, 114 U. S. 270, 295. Accordingly, the rule has long been settled that a litigant can challenge the validity of an act only when it is applied to his own disadvantage. *Yazoo & Mississippi Ry. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219; *Premier-Pabst Sales Co.* v. *Grosscup*, 298 U. S. 226; *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445, 455; *Bourjois, Inc.* v. *Chapman*, 301 U. S. 183. We submit that this established principle of constitutional litigation is equally applicable in the case of a statute challenged as too indefinite.

It is true that in the great majority of the cases in which this Court has considered the constitutionality of statutes said to be too indefinite, it has decided the question in the abstract and without reference to the facts of the specific case before it.[1]

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[1] See *Lloyd* v. *Dollison*, 194 U. S. 445, 450; *Waters-Pierce Oil Co.* v. *Texas* (No. 1), 212 U. S. 86; *Nash* v. *United States*, 229 U. S. 373, 377–378; *Omaechevarria* v. *Idaho*, 246 U. S. 343; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *Levy*

But this is not an undeviating or settled rule, for in several cases the Court has limited the inquiry to the uncertainty or doubt to which the particular assailant could have been subjected.

In *Fox* v. *Washington*, 236 U. S. 273, the Court did not inquire into all the possible uncertainties latent in the statute forbidding publication of matter which "shall tend to encourage or advocate disrespect for law." Instead, it said (p. 277):

> If the statute should be construed as going no farther than it is necessary to go in order to bring the defendant within it, there is no trouble with it for want of definiteness.

In *Miller* v. *Strahl*, 239 U. S. 426, the Court similarly refused to examine the borderline cases arising under a statute requiring innkeepers, in case of fire, "to do all in their power" to save their guests. It said (pp. 432, 433):

Leasing Co. v. *Siegel*, 258 U. S. 242, 249–250; *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233; *Connally* v. *General Construction Co.*, 269 U. S. 385; *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 518–520; *United States* v. *Alford*, 274 U. S. 264, 267; *Whitney* v. *California*, 274 U. S. 357, 369–370; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; *Stromberg* v. *California*, 283 U. S. 359; *Smith* v. *Cahoon*, 283 U. S. 533, 564–565; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210; *Sproles* v. *Binford*, 286 U. S. 374; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 81–82; *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183, 196; *Kay* v. *United States*, 303 U. S. 1, 9; *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453; *Minnesota* v. *Probate Court*, 309 U. S. 270, 274.

> * * * we need not consider whether the statute exacts from him and his employes heroic conduct * * *. It is entirely aside from the questions in the case and the requirements of the statute to consider the dismays and perils of an extreme situation, and what then might be expected of courage or excused to timidity.

Again, in *United States* v. *Wurzbach,* 280 U. S. 396, a member of the House of Representatives was indicted under the Federal Corrupt Practices Act. The Court did not consider his attack based upon the indefiniteness of its prohibitions, which applied to "any Senator or Representative * * * or any person receiving any salary * * * from money derived from the Treasury of the United States." It said (p. 399):

> There is no doubt that the words include representatives, and if there is any difficulty, which we are far from intimating, it will be time enough to consider it when raised by someone whom it concerns.

In *International Harvester Co.* v. *Kentucky,* 234 U. S. 216, 223, the Court recognized the applicability of the doctrine but considered that it had an extreme case before it. This, too, was the view adopted in *Herndon* v. *Lowry,* 301 U. S. 242, 261–264. And in one case the Court has in the large directed its discussion to the specific facts before it, without, however, noting that the result might be different in

other cases.[6] Finally, it is to be noted that the older approach to the question, as adopted in *United States* v. *Brewer*, 139 U. S. 278, was the simpler rule that a man was not covered by an act insufficiently explicit. This would seem automatically to restrict the inquiry to the doubts and uncertainties of the particular assailant before the Court.

It is, we recognize, not easy to reconcile these cases with the more general practice of the Court. Several lines of inquiry, however, offer suggestive aid.

In the first place, in not one of the 21 cases in which the Court treated the statute in general terms, apart from the status of the particular assailant, was it urged in support of the statute that the assailant could raise only his own doubts.[7] This element of practical litigation in itself serves to minimize the weight of the usual practice of this Court.

In the second place, in many cases it is highly improbable that the particular assailant would have any less doubt as to the application of the statute than would others. In other words, almost everyone affected by some statutes is of necessity a border-line case.[8] If this test be applied to the cases in which

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[6] *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 501–503; cf. *Bandini Co.* v. *Superior Court*, 284 U. S. 8, 18.

[7] In *Kay* v. *United States*, 303 U. S. 1, No. 61, October Term, 1937, the Government assumed (Br. 41), but did not urge, that petitioner could raise only her own doubts.

[8] The contrast between "ambiguous" and "indefinite" statutes may be helpful here. If there is doubt as to which of two or more specific meanings was intended, everyone is

the Court has looked at the challenged statute in its abstract operation, only eight cases seem to us to represent decisions cast in unduly general terms for cases where the uncertainty under the statute would seem to vary considerably between particular applications.[9]

Finally, a ground for demarcation may be found in the field of conduct regulated by the statute. The vice of an indefinite statute may be less the unexpected punishment inflicted upon the particular assailant than its *in terrorem* interference with the conduct of many who refrain from innocent activity for fear of the reach of the indefinite statute. In this view, the scope of the inquiry perhaps should turn on the general nature of the field

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assailed by the same doubt, and there would be no reason to limit the standing to attack the statute. See, e. g., "current rate of wages" (*Connally* v. *General Construction Co.*, 269 U. S. 385); peaceful or violent "opposition" to government (*Stromberg* v. *California*, 283 U. S. 359); which public carrier provisions were constitutionally applicable to private carriers (*Smith* v. *Cahoon*, 283 U. S. 553). But if the doubt is simply one of degree, as to how far the statute reaches, the doubts of peripheral persons should not aid those clearly included.

[9] *Lloyd* v. *Dollison*, *Omaechevarria* v. *Idaho*, *Whitney* v. *California*, *Sproles* v. *Binford*, *United States* v. *Shreveport Grain & Elevator Co.*, *Kay* v. *United States*, *Lanzetta* v. *New Jersey*, *Minnesota* v. *Probate Court*, all *supra*, note 5. This classification excludes the various cases dealing with unreasonable prices, etc., on the ground that it is improbable, under the force of ordinary economic conditions, that the assailant could be *sure* that his prices were unreasonable, etc.

of activity to which the statute is or might be applicable. If fields of conduct probably considered by the legislature to be socially desirable or unobjectionable were subjected to regulation or interference, the Court might well feel that adequate protection of those not before the Court required a general inquiry into the definiteness of the statute; if the conduct subjected to doubt by the statute were not such that the legislature could be supposed to intend to encourage it, the inquiry might appropriately be limited to the doubts of the particular assailant. Measured by this test, only two cases seem to have adopted too broad an approach.[10]

No one of these factors can be said to be conclusive under the authorities. But in combination they point to a rather clear result. Where the point has been raised, where the doubts as to the applicability of the statute may vary markedly between individual cases; and where no activity which the legislature would consider innocent or desirable is subjected to fear of illegality, the Court has never made a broad inquiry into the doubts which persons not before the Court might have as to the applicability of the statute.

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[10] *Lloyd* v. *Dollison*, *Lanzetta* v. *New Jersey*, both *supra* note 5. This classification excludes the statutes interfering with free speech, on the ground that the desirability of free discussion overrides the undesirability of verbal or written attacks upon our laws and form of government. See *Herndon* v. *Lowry*, 301 U. S. 242, 264.

In the present case, we insist that petitioners cannot raise the doubts which others might feel as to the applicability of Sections 1 (b) and 2 (a) of the Espionage Act (cf. Br. 17–18, 59). Those provisions will obviously apply with marked clarity to some, whatever might be the peripheral doubts, and if indefinite they serve to discourage only the highly undesirable activity of revealing information about our national defense which is to be used to the injury of the United States or the advantage of a foreign power.

2. *Petitioners Had No Substantial Doubts.*—The Court in this case is not faced with the difficult issues suggested by petitioners (Br. 17–18). There is no need to envisage a hapless correspondent sending a despatch to his press which could arguably disclose information connected with the "national defense," or the penalties which might be visited upon a critical statesman who complained of inadequacies in our military or naval establishments.[11] The activities of the petitioners were such that they could

[11] In point of fact, of course, such instances would in no circumstances be included within the reach of Sections 1 (b) and 2 (a), which require that the information be obtained or revealed "with intent or reason to believe that the information * * * is to be used to the injury of the United States or to the advantage of a foreign nation," and since it is doubtful that the innocent would either be able or would care to disclose military information which should be held as confidential.

not reasonably have believed that the revealed information was innocent or wholly unrelated to the national defense.

Salich was employed as an investigator by the Naval Intelligence. An important part of his work was the detection of Japanese espionage. Substantially all of this information he turned over to Gorin as the representative of the U. S. S. R. For this he received money from Gorin. The negotiations and the disclosure of secret naval information was probably carried on without any knowledge of Salich's superiors, who certainly did not know that he was being paid for his disclosures (See *supra*, pp. 8–14).

This is not the type of conduct which permits either participant to protest punishment under Sections 1 (b) and 2 (a) of the Espionage Act. No member of a military intelligence service can sell information, which has been gathered for the intelligence service, to a foreign nation without being fully aware that it would be at least a very close question whether the information is connected with the "national defense." By the same token the agent of the foreign nation which purchases the information is equally aware of his dangers under the Espionage Act.

Salich, it is true, testified that he was familiar with the Espionage Act and that he did not believe

that his actions constituted a violation of the Act (*supra*, p. 11). But, quite evidently, a statute cannot be held invalid simply because one who violates it has erroneously estimated that he probably could escape the letter of the law. This Court in *United States* v. *Wurzbach*, 280 U. S. 396, answered the precise contention. There the defendant objected that he could not be sure what was included within the proscribed "political purposes." The Court replied (p. 399):

> * * * But we imagine that no one not in search of trouble would feel any [objection]. Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk. *Nash* v. *United States*, 229 U. S. 373.

Equally here, petitioners cannot convict the statute of invalidity because Salich erroneously considered that he probably could avoid its application.

C. SECTIONS 1 (b) AND 2 (a) OF THE ESPIONAGE ACT ARE NOT UNCONSTITUTIONALLY INDEFINITE

Even if petitioners have standing to launch a general attack upon Sections 1 (b) and 2 (a) of the Espionage Act, that attack must fail. We submit that those provisions, when measured by the *criteria* of validity which this Court has recognized, meet every requirement of the Constitution.

1. *Generality of the Language.*—The court below assumed in its opinion that the only relevant consideration was the generality or indefiniteness of the statutory language (R. 728–731); petitioners seem to proceed upon the same premise (Br. 38–49). In one sense the generality of the language is all-important, for if the provisions are specific and detailed no question of unconstitutional indefiniteness can arise. But, if it be established that the term "national defense" is indefinite, this is simply the starting point and is not the terminal of the inquiry. The statutes which have been upheld by this Court, equally with those which have been condemned, have used indefinite language. The reason why some are valid and others invalid must lie in other fields.

It may be, of course, that a legislature could choose its language so clumsily that it conveyed no meaning whatever. Probably a statute of this nature would be invalid simply because of the generality of its language. But none of the cases which have reached this Court have been of this nature. The language of the sustained statutes, by any ordinary or comprehensible standard, have been no more explicit than those condemned. This is amply demonstrated by the opinion below (R. 728–731); we shall not labor the point, but have simply collected the cases in the margin.[12]

[12] The following 21 cases sustained the quoted statutory language: *Lloyd* v. *Dollison*, 194 U. S. 445, 450 (liquor restrictions varying according to sale at "wholesale" or "re-

The term "national defense," at least when stripped from its context in the Espionage Act (see *United States* v. *Alford*, 274 U. S. 264, 267), is a generic term which does not have precise contours. Some things, such as battleships, are clearly

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tail"); *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U. S. 86, 108–111 (contracts "reasonably calculated" or which "tend" to fix prices); *Nash* v. *United States*, 229 U. S. 373, 376–378 (unreasonable or undue restraints of trade); *Standard Oil Co.* v. *United States*, 221 U. S. 1, 69 (same); *Fox* v. *Washington*, 236 U. S. 273, 277–278 ("tend to encourage or advocate disrespect for law"); *Miller* v. *Strahl*, 239 U. S. 426, 432–434 (innkeepers to do "all in their power to save" guests in case of fire); *Omaechevarria* v. *Idaho*, 246 U. S. 343, 345, 348 ("any cattle range previously * * * or * * * usually occupied by any cattle grower"); *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242, 249–250 ("unjust and unreasonable" rent, under an "oppressive agreement"); *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 501–503 (meat represented to be "kosher"); *Miller* v. *Oregon*, 273 U. S. 657 (dangerous rate of speed; see 274 U. S. at 464–465); *United States* v. *Alford*, 274 U. S. 264, 267 (building fires "near" any forest or inflammable material); *Whitney* v. *California*, 274 U. S. 357, 360, 368–369 (membership in organization "advocating" or "aiding and abetting * * * unlawful methods of terrorism as a means of * * * effecting any political change"); *Miller* v. *Schoene*, 276 U. S. 272, 277, 278, 281 (cedar trees investigated on request of "freeholders" and condemned if dangerous to an "apple orchard in said locality"); *United States* v. *Wurzbach*, 280 U. S. 396, 399 (receiving contributions for "any political purpose whatever"); *Bandini Co.* v. *Superior Court*, 284 U. S. 8, 18 ("unreasonable waste" of gas, construed to mean escape of gas beyond that necessary to lift oil to surface); *Sproles* v. *Binford*, 286 U. S. 374, 393 ("shortest practicable route"); *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 81–82 ("reasonable variations" in weight or measure); *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183, 196 (resale price contracts for branded products

included; other things, such as perfume factories, are excluded. Others might be doubtful. In this

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in "fair and open competition" with other brands); *Kay* v. *United States*, 303 U. S. 1, 8–9 ("ordinary fees * * * for services actually rendered"); *Neblett* v. *Carpenter*, 305 U. S. 297, 302–303 ("mutualize or reinsure the business of" an insurance company "or enter into rehabilitation agreements"); *Minnesota* v. *Probate Court*, 309 U. S. 270, 274 (habitual course of sexual misconduct showing uncontrollable impulses).

The following 13 cases held the quoted statutory language unconstitutionally indefinite: *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 221–224 (raising prices above "market value under fair competition, and under normal market conditions"); *Collins* v. *Kentucky*, 234 U. S. 634 (same); *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 89–93 ("unjust or unreasonable rate or charge in * * * dealing in * * * necessaries"); *Weeds, Inc.*, v. *United States*, 255 U. S. 109 (exacting "excessive prices for any necessaries"); *Small Co.* v. *American Sugar Ref. Co.*, 267 U. S. 233, 237–242 (same); *Connally* v. *General Construction Co.*, 269 U. S. 385, 391–395 ("current rate of * * * wages in the locality"); *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 517–522 (keeping such account books in English or Spanish as adapted to needs of taxing officers); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (trade combinations permitted when designed "to market at a reasonable profit those products which cannot otherwise be so marketed"); *Stromberg* v. *California*, 283 U. S. 359, 369 (displaying any "symbol or emblem of opposition to organized government"); *Smith* v. *Cahoon*, 283 U. S. 553, 564–565 (such provisions regulating common carriers as could constitutionally be applied to private carriers); *Champlin Refining Co.* v. *Commission*, 286 U. S. 210, 241–243 (production of oil in such a manner as to constitute "waste"); *Herndon* v. *Lowry*, 301 U. S. 242, 261–264 (distribution of pamphlets intended at any time in the future to lead to resistance by force to law); *Lanzetta* v. *New Jersey*, 306 U. S. 451 ("known to be a member of any gang").

sense, then, the term "national defense" is indefinite. Whether it is unconstitutional because of its indefiniteness is a wholly different inquiry, which must be answered in terms of the numerous *criteria* established by the decisions of this Court.

2. *General Considerations.*—The inquiry into the validity of Sections 1 (b) and 2 (a) of the Espionage Act is aided by several canons of constitutional adjudication, which are not the less important because their teaching is cast in general terms.

(a) The settled rule that a statute is presumed to be constitutional unless its invalidity is clearly shown is, of course, fully applicable when the ground of attack is that the statute is too indefinite.[13] *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 92–93. Here Congress paid heed to the constitutional question now raised (54 Cong. Rec. 3485–3486, 3586, 3588; 55 Cong. Rec. 1591). Its judgment is entitled to the usual respect.

(b) It is not enough to show that there may be cases in which application of the statute is uncertain. Men ordinarily speak in words which lack a mechanical precision of denotation. There will be found around almost every statute an inevitable fringe of uncertainty and doubt. This periphery of indefiniteness may be more extensive in some

[13] We cannot follow the reasoning of the opinion below, which said the supposedly contradictory lines of decision in this Court removed the presumption of constitutionality but left the assailant under the burden of proving a clear case (R. 731).

cases than in others but its existence is ordinarily inescapable. "The law is full of instances where a man's fate depends upon his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." *Nash* v. *United States*, 229 U. S. 373, 377. "Whenever the law draws a line there will be cases very near each other on opposite sides." *United States* v. *Wurzbach*, 280 U. S. 396, 399. See also, *Lloyd* v. *Dollison*, 194 U. S. 445, 450; *Miller* v. *Strahl*, 239 U. S. 426, 434; *Omaechevarria* v. *Idaho*, 246 U. S. 343, 348; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 502.

The following pages take up the specific *criteria* of validity which have been recognized by this Court and which are applicable to the case at bar.[14]

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[14] Several *criteria* which are inapplicable to the case at bar may be mentioned, in order to present a rounded picture. (1) An otherwise unduly indefinite statute will not be held invalid if it receives an administrative or judicial refinement before its application. *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 81–82; *Miller* v. *Schoene*, 276 U. S. 272, 281; *Kay* v. *United States*, 303 U. S. 1, 9; *Neblett* v. *Carpenter*, 305 U. S. 297, 302–303; see *Smith* v. *Cahoon*, 283 U. S. 553, 565; *Champlin Refining Co.* v. *Commission*, 286 U. S. 210, 242; *Small Co.* v. *American Sugar Ref. Co.*, 267 U. S. 233, 239; cf. *Bandini Co.* v. *Superior Court*, 284 U. S. 8, 18; compare *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183, 196. (2) An indefinite statute which uses common law terminology receives into it the precision of prior case-by-case decisions. *Nash* v. *United States*, 229 U. S. 373, 377; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 69; see *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 223; *Connally* v. *General Construction Co.*, 269 U. S.

3. *The Penalty Applies Only If There Be An Intent to Disclose Military Secrets.*—Sections 1 (b) and 2 (a) of the Espionage Act punish one who obtains and reveals information relating to the national defense only if this be done "with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation." The information, moreover, must be of military significance and, broadly speaking, of a secret or confidential nature. These limitations, we submit, of themselves serve to repel any attack upon the constitutionality of those sections.

Sections 1 (b) and 2 (a) cannot be applied to punish surprised innocence. The newspaper correspondents, the critical statesmen, the political commentators, the students of military affairs, who obtain and reveal information regarding the national defense are automatically excluded from the reach of those provisions. For they apply only to those who obtain and reveal confidential or

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385, 391; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 459–461; *Champlin Refining Co.* v. *Commission*, 286 U. S. 210, 242; *Herndon* v. *Lowry*, 301 U. S. 242, 263. (3) The standards are probably less severe for civil than for criminal statutes. *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242, 249–250; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 463–464; see *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 518; compare *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233, 237–242. (4) An indefinite exemption from an acceptably specific general prohibition may perhaps be allowed greater tolerance. *Sproles* v. *Binford*, 286 U. S. 374, 393; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 81–82; compare *Collins* v. *Kentucky*, 234 U. S. 634; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445.

secret information, broadly defined, of a military nature, with a conscious desire, or with a reasonable expectation, of causing injury to the United States or advantage to a foreign nation. If this be the case, there can be no serious problem as to the scope of the term "national defense." In the first place, those who reveal such information with such an intention, or with reason to believe that it would cause such a result, cannot be heard to complain that they were not sure what was meant by "national defense." In the second place, information which is intended to be used to injure the United States or which should be expected to benefit a foreign nation, and is, broadly speaking, secret or confidential information of a military character, must by its nature lie well within the field of particulars which clearly and unmistakably is included in the generic term "national defense."

This Court has on several occasions noted that the requirement of *scienter* prevented an attack upon a statute because of its undue indefiniteness. It has, moreover, never held a statute invalid for indefiniteness when *scienter* was clearly required for its violation.

In *Omaechevarria* v. *Idaho,* 246 U. S. 343, 348, it held valid a statute forbidding sheep grazing "upon any range usually occupied by any cattle grower;" an alternative ground of decision was the statutory requirement of intent or criminal negligence, which removed any danger to sheep-

men. And in *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 501, the Court said:

> in reaching a correct determination as to whether a given product is kosher, appellants are unduly apprehensive of the effect upon them and their business, of a wrong conclusion in that respect, since they are not required to act at their peril but only to exercise their judgment in good faith, in order to avoid coming into conflict with the statutes. * * *

See, to the same effect, *Commonwealth* v. *Reilly*, 248 Mass. 1, 4–7, 142 N. E. 915, 918 (Mass. 1924); *Usary* v. *State*, 112 S. W. (2d) 7, 10–11 (Tenn. 1938).

Only one of the statutes held invalid because too indefinite (note 12, *supra*, p. 79) had any provision which suggested the necessity of scienter.[15]

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[15] Section 4 of the Lever Act was held invalid in *United States v. Cohen Grocery Co.*, 255 U. S. 81; *Weeds, Inc.* v. *United States*, 255 U. S. 109; *Small Co.* v. *American Sugar Ref. Co.*, 267 U. S. 233. The statute as quoted in 255 U. S. at 86 reads as though intent were required. But the full text of the Section, as set out in 255 U. S. at 81–82, shows that intent was no part of the clauses under attack.

The accumulation of statutes held invalid in *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, and *Collins* v. *Kentucky*, 234 U. S. 634, was construed by the state court to make unlawful any combination "for the purpose *or with the effect* of fixing a price that was greater or less than the real value of the article" (234 U. S. at 221). [Italics added.]

In *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, the condemned statute excepted from the antitrust laws combinations "the object and purposes of which are to conduct operations at a

The statute condemned in *Herndon* v. *Lowry*, 301 U. S. 242, did not in terms require intent, but, as construed by the state court, it punished the attempt to incite insurrection, if force was contemplated by the inciter "at any time within which he might reasonably expect his influence to continue" (301 U. S. at 254–255). The statute as thus construed might be thought to require either (1) an intent to stimulate force and violence, or (2) an intent to utter words which "might, at some time in the indefinite future" (301 U. S. at 262), lead to force and violence. It is clear that this Court adopted the latter construction, and thus assumed that the statute reached one, "however peaceful his own intent" (301 U. S. at 262).

It seems clear then, both upon reason and upon authority, that a statute cannot be condemned as unconstitutionally indefinite if its sanctions apply only after *scienter* is established. In the present case, the statute not only requires *scienter* (or the substantially equivalent "reason to believe") before its penalties apply, but it offers additional limitations by which to guard against entrapment of the innocent, the facts that the revealed infor-

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reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed" (274 U. S. at 456). This statute did not punish only those with a guilty intent but all persons except those with a specified good intent (together with the additional objective factor that the products can be marketed only by combinations).

mation must be, broadly speaking, secret or confidential and must be of a military nature. The cases, then, apply *a fortiori* here. For this reason alone the attack upon Sections 1 (b) and 2 (a) of the Espionage Act must fail. We shall, however, deal briefly with the additional factors which corroborate this conclusion.

4. *Words of Common Usage.*—The term "national defense" is a part of the common speech. In common with other words of ordinary usage, it wants precision. But, as it serves to convey an adequate meaning in day-to-day communication, it serves equally when used in the statute. The House Member in charge of the bill which became the Espionage Act said of "national defense" that "Its meaning is pretty well understood in the minds of the public" (55 Cong. Rec. 1594). This Court has frequently recognized the principle that the legislature is allowed the indefiniteness of ordinary speech. In *Sproles* v. *Binford,* 286 U. S. 374, 393, it said:

> The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding. * * * The use of common experience as a glossary is necessary to meet the practical demands of legislation.

See, to the same effect, *Lloyd* v. *Dollison,* 194 U. S. 445, 450; *Hunt* v. *State,* 195 Ind. 585, 146 N. E. 329 (1925); *Martin* v. *United States,* 100 F. (2d)

490, 494 (C. C. A. 10th), certiorari denied, 306 U. S. 649; see *Miller* v. *Oregon*, 273 U. S. 657 (discussed in 274 U. S. at 464–465); cf. *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 464–465; *United States* v. *Alford*, 274 U. S. 264, 267. It may be noted in this connection that "national defense" is substantially identical with "common defense," a term twice used in the Constitution. Cf. *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242, 250.

5. *Technical Meaning.*—Whatever might be thought to be the vagueness of "national defense" to the man in the street, the term receives additional content to those familiar with military, naval, or espionage work. None unfamiliar with these matters is likely to obtain and reveal confidential military information intended to be used to the injury of the United States or the advantage of a foreign nation. Certainly petitioners cannot complain that the statute applies to them as laymen; in a very real sense, each was in the "national defense" business. The case comes, therefore, within the rule that the words of a statute are not too indefinite if they carry a meaning which, because of their familiarity with the subject matter, is clear to those covered by the statute. *Omaechevarria* v. *Idaho*, 246 U. S. 343, 348; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 502; see *Connally* v. *General Construction Co.*, 269 U. S. 385, 391; *Miller* v. *Oregon*, 273 U. S. 657 (discussed 274 U. S. at 464–465); *Champlin Refining Co.* v. *Com-*

mission, 286 U. S. 210, 242–243; cf. *Bandini Co.* v. *Superior Court,* 284 U. S. 8, 18.

6. *The Language Could Be No More Precise.*— Section 1 (a) of the Espionage Act enumerates some 24 places included for the purposes of that subdivision within the term "national defense." Yet, if the generic term were to be abandoned for Sections 1 (b) and 2 (a), it is evident, as we have shown, that the enumeration in Section 1 (a) would be woefully incomplete and that *any* satisfactory particularization would be impossible (*supra,* pp. 57–58). This Court has recognized that the ideal of complete specificity must yield to the practical requirements of legislation. In *Miller* v. *Strahl,* 239 U. S. 426, 434, it said:

> Rules of conduct must necessarily be expressed in general terms and depend for their application upon circumstances, and circumstances vary. It may be true, as counsel says, that "men are differently constituted," some being "abject cowards, and few only are real heroes;" that the brains of some people work "rapidly and normally in the face of danger while other people lose all control over their actions." It is manifest that rules could not be prescribed to meet these varying qualities. Yet all must be brought to judgment. And what better test could be devised than the doing of "all in one's power" as determined by the circumstances?

See, also, *Bandini Co.* v. *Superior Court,* 284 U. S. 8, 18; *Miller* v. *Oregon,* 273 U. S. 657 (discussed in

274 U. S. at 464–465); *Mulkern* v. *State*, 176 Wis. 490, 493, 187 N. W. 190 (1922).

7. *Necessity of Prolonged Investigation.*—The Court has several times emphasized that the necessity of a prolonged investigation, with an uncertain conclusion, in order to ascertain the application of a statute, contributed to its invalidity. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 222–224; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 457; *Champlin Refining Co.* v. *Commission*, 286 U. S. 210, 243; *Smith* v. *Cahoon*, 286 U. S. 553, 564. Certainly, it requires no prolonged or complicated investigation in order to exercise ordinary judgment as to whether a given particular is included in the generic term "national defense."

8. *Any Uncertainty Does Not Affect Legitimate Activity.*—Sections 1 (b) and 2 (a) of the Espionage Act, so far as they contain indefinite prohibitions, do not stand as an *in terrorem* threat to legitimate activity, which although not included within the statute might be unsettled through fear of the reach of the statute. The provisions are, instead, directed only at those who obtain or reveal confidential military information to be used to the injury of the United States or the advantage of a foreign nation. (See *supra*, pp. 82–83.) There are, then, no considerations of policy which make it imperative to strike down the sections because of any latent indefiniteness which might otherwise terrorize innocent activity.

On several occasions this Court has explicitly recognized that the indefiniteness of the condemned statute constituted an interference with legitimate activity. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 223–224; *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 512–513, 525; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 465; cf. *United States* v. *Wurzbach*, 280 U. S. 396, 399. Of perhaps equal importance is the fact that almost without exception,[16] every case which has been held by this Court to be unconstitutionally indefinite (see note 12 *supra*, p. 79) has restricted activities normally considered innocent or desirable. The present case obviously falls outside this category.

9. *Force of Policy Requiring Prohibition.*—A related, and perhaps more general, ground for sustaining the validity of Sections 1 (a) and 2 (b) of the Espionage Act is the imperative need for prohibition of disclosure of military or naval secrets. It is unnecessary to underscore the magnitude of this consideration. It receives additional force when it is remembered that the "national defense" could not satisfactorily be particularized in detailed language (*supra*, pp. 57–58), and that the statute reaches only those who act with an inten-

[16] Viewing the free speech cases (*Stromberg* v. *California*, 283 U. S. 359; *Herndon* v. *Lowry*, 301 U. S. 242) as protecting free speech rather than opposition to government, *Lanzetta* v. *New Jersey*, 306 U. S. 451, is the only exception, and even there the Court thought the statute could arguably reach to "gangs" of workers (p. 457).

tion, or reasonable expectation, to injure the United States or aid a foreign nation by disclosure of confidential information (*supra*, pp. 82–83). Under such circumstances the Court should hesitate to declare the provisions invalid in order to guard against wholly theoretical doubts and uncertainties on the part of innocent persons. In *Herndon* v. *Lowry*, 301 U. S. 242, 264, it was relevant that the condemned statute restricted the important field of freedom of speech. By the same token, it is relevant that the challenged provisions of the Espionage Act punish only the obtaining and revealing of confidential information relating to the national defense with the intent or reason to believe that it will be used to the injury of the United States or the advantage of a foreign nation; it is difficult to believe that any innocent activity would be unsettled through fear of punishment under these provisions.

IV

THE EVIDENCE SUPPORTED THE VERDICT AND THE CONVICTION WAS PROPER UNDER THE STATUTE AND PRINCIPLES OF CRIMINAL PROCEDURE

There remain for discussion three subsidiary contentions or suggestions of petitioners: (a) the revealed information as a matter of law was too innocuous to permit conviction under the Espionage Act; (b) Sections 1 (b) and 2 (a) are inapplicable because it is necessary to show that the re-

vealed information will injure the United States; and (c) the court should have directed a verdict of not guilty under the conspiracy count. We think that none has merit.

A. THE EVIDENCE SUPPORTS THE VERDICT

Petitioners urge (Br. 22, 52–53, 63–93) that the information which Salich obtained and gave to Gorin is as a matter of law too innocuous to permit their conviction.[1] The argument does not depend upon the interpretation given "national defense" as used in Sections 1 (b) and 2 (a) of the Espionage Act, but rests upon the premise that petitioners cannot be convicted for obtaining and revealing harmless information.

This Court will not review the evidence to determine whether it supports the verdict (*supra*, p. 25). But if it were to do so, it would be plain that the judgments below should not be reversed because the revealed information was innocuous.

1. *It Would Be Immaterial if the Information Were Innocuous.*—Sections 1 (b) and 2 (a) of the Espionage Act contain no qualification or limitation that the revealed information must in fact be dangerous to the United States or of real value to a foreign nation. Instead, they punish whoever obtains or reveals information "with intent or

[1] The point, at least in general terms, was adequately preserved by each petitioner in the lower courts. See R. 41–42, 46, 50–51, 57, 318–320, 323–325, 384–385, 399–401, 407, 454–455, 458–459, 464–465, 567–569 *et seq.*, 599–601, 605–606, 641–643.

reason to believe that the information * * * is to be used to the injury of the United States, or to the advantage of any foreign nation." The statute does not require that the injury be grave, or that the advantage be important; it does not even require that the accused should have intended an injury or advantage of any magnitude. It is sufficient, under its terms, if *any* injury or advantage is intended.

The necessity that an injury to the United States or an advantage to a foreign nation be intended or reasonably expected serves automatically to eliminate the danger of severe punishment for merely technical or trivial disclosures. Congress was entitled to assume that no person who obtains and reveals military information to the representative of a foreign nation with such an intent or expectation would be trafficking in wholly innocuous tidbits or inconsequential gossip. And, even if that assumption should sometime prove erroneous, there is no reason why Congress should not want to punish one whose intention to injure the United States or benefit a foreign nation was frustrated only because the revealed information in fact was too unimportant to produce the contemplated injury or advantage. There is, then, no occasion to plunge into the record in order to ascertain the precise degree of injury or advantage which the revealed information would constitute.

2. *The Information Was not Innocuous.*—But, if that inquiry were to be made, it is evident that the jury had ample evidence to support its verdict.

We agree with the court below that "most of" the reports, from which the information was obtained and revealed, "on their face, appear innocuous, there being no way to connect them with other material which the Naval Intelligence may have, so that the importance of the reports does not appear" (R. 715).[2] This does not mean that all of the reports were innocuous or even unimportant: (a) some of them, even on their face, contain possible sources of injury to the United States or advantage to the U. S. S. R.; and (b) the jury was entitled to assume that the information, even if innocuous on its face, would have more importance when fitted into a larger mosaic.

(a) Three of the reports from which information was obtained and revealed dealt with Japanese in the United States who were suspected of being communists.[3] There is evidence that at least one of these reports was given Gorin so that "Gorin could contact him direct" (R. 173). Four of the reports dealt with Americans suspected of being communists.[4]

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[2] Petitioners obviously are not warranted in calling this a concession by the court below that the reports were innocuous (see Br. 22, 52–53).

[3] Report Nos. 833 (R. 259), 841 (R. 260), 1130 (R. 264–265). Two of the suspected communists were said to be related by marriage to Japanese naval officers (R. 260, 265).

[4] Report Nos. 849 (R. 174), 889 (R. 261–262), 967 (R. 174), 1066 (R. 175, cf. R. 363). Reports Nos. 849 and 1066 apparently were intended to result in information for Salich from Gorin (R. 174, 175).

One was "a civil-service employee in the aircraft division" and a member of the naval reserve (R. 262). As to at least one of these suspected communists, "it was then up to Gorin to make a contact with her if he so desired" (R. 174). It seems evident enough that the disclosure to a representative of the U. S. S. R. of suspected communists, so that he could "contact" them directly, was in order that they might prove useful agents or sources of information for the U. S. S. R. Espionage and counter-espionage may well be a common practice in international relationships, but giving this affirmative aid to a foreign nation can hardly be characterized as innocuous.

Again, nine of the reports dealt with some 21 suspected Japanese spies.[5] One Salich thought would also work for the U. S. S. R. (R. 175). Three of the reports discussed the probable espionage activities of Japanese boats.[6] It does not seem to us "innocuous" to reveal to a representative of the U. S. S. R. information collected by the Naval Intelligence as to espionage in this country. No foreign nation can have the same interest as the United States in keeping secret its defenses against espionage. By deliberation or by inadvertence the information given the U. S. S. R. might through its representatives be made

[5] Report Nos. 507 (R. 281–282), 528 (R. 278–279), 548 (R. 274), 570 (R. 270–271), 973 (R. 175), 1081 (R. 269–270), 1104 (R. 268–269), 1110 (R. 266–267), 1129 (R. 265).

[6] Report Nos. 536 (R. 275–276), 560 (R. 271–274), 1081 (R. 269–270).

known to Japan. And it is reasonable to suppose that the U. S. S. R. would find it of some advantage to know of Japanese espionage in the United States or of the adequacy of the American counterespionage against Japan. The former might suggest the extent of any Japanese espionage in the U. S. S. R., and the latter might indicate the adequacy of American defenses against any U. S. S. R. espionage.

Finally, one of the reports discussed an acid supposed to have been developed by Japan which, when placed in the sea, would corrode nearby metal;[7] and another dealt with a fibre helmet and gloves developed in Japan which would be useful for going through barbed-wire defenses.[8] It might possibly be to the injury of the United States or the advantage of the U. S. S. R. to have this information.

These reports alone, we submit, are sufficient to show that the revealed information was not "innocuous" but contained a real danger of injury to the United States or advantage to the U. S. S. R.

(b) Most of the reports, it is true, dealt merely with the movements, activities, and sentiments of Japanese in the United States (*supra*, pp. 10–11). As such they were innocuous on their face. But, even if all of the reports had been of this character, the jury was entitled to assume that they would have more importance when added to the information already possessed by the Naval Intelligence or by the U. S. S. R.

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[7] Report No. 560 (R. 271–274).

[8] Report No. 1132 (R. 264).

This would be a reasonable presumption from the facts. (1) The Naval Intelligence obviously thought the information sufficiently valuable to pay Salich his salary, to digest his reports, and to transmit copies to the main San Diego office. (2) Gorin, as a representative of the U. S. S. R., thought the reports sufficiently valuable to pay Salich a total of $1,700 over a period of nine months to obtain them. Only two inferences are possible: either the reports have a significance not apparent on their face or both the Naval Intelligence and the U. S. S. R. intelligence services conduct their operations wholly without regard to any practical benefits. Of these inferences, the former is by far the more probable.

But the question is not left to inference. The record clearly establishes that Gorin assured Salich that the information might have a value beyond its apparent importance. "There was always a possibility of some local angle having to do with possible Japanese Espionage in Russia" (R. 180). "There might be an item or two which might be connected with something in which they were interested" (R. 338). "Some of this inconsequential information somewhere, somehow, might fit in some picture" (R. 365). The Japanese espionage service, Gorin explained, "had worldwide ramifications and that what they did in any other part of the world might directly or indirectly have a bearing as to what the Japanese did in their own

country, namely, U. S. S. R." (R. 378–379). If Gorin and Salich thus thought the information would have value when fitted into a larger picture, they cannot complain that the jury adopted the same view.

B. THE STATUTE PUNISHES ADVANTAGE TO A FOREIGN NATION WHETHER OR NOT THERE IS INJURY TO THE UNITED STATES

Petitioners urge (Br. 53–54) that they were erroneously convicted because the trial judge instructed the jury (R. 426):

> it will be sufficient to satisfy the requirements of the law if, for example, the Government proves to you beyond a reasonable doubt that both Salich and Gorin had reason to believe that the information disclosed was to be used to the advantage of Russia. * * *

The statute, they say, should be construed to punish only the disclosure of information with the intent that it should be used to the advantage of a foreign nation as against the United States; in other words, that the criminal intent must be to injure the United States.

1. We do not believe the question is open to petitioners, because it was not specifically presented by the petition for a writ of certiorari.[9] The "Ques-

[9] Petitioner Gorin adequately preserved the point in the trial court (R. 401, 403–404, 405–406, 459–460) and in this assignment of errors on appeal (R. 677, 686–687, 690, 691–692). Petitioner Salich raised the point only by implication (see R. 406, 454, 604–606). The circuit court of appeals did not discuss the contention.

tions Presented" by the petition include only the general question "whether the jury was properly instructed as to the law," the specification of errors is equally vague, and the "Reasons" are silent[10] (Pet. 3, 9). Review here is ordinarily "limited to the questions specifically brought forward by the petition." *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 177, 179; *Connecticut Ry. Co.* v. *Palmer*, 305 U. S. 493, 496–497. Since, however, it is not entirely clear that the rule should be applied with its full vigour against a defendant's petition in a criminal case, we shall discuss the question on its merits.[11]

2. The language of the statute is, we think, too explicit to admit of argument as to its meaning. Sections 1 (b) and 2 (a) of the Espionage Act punish the obtaining and disclosure of national defense information "with intent or reason to believe that

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[10] The conjunction, it is true, is italicized at one point in quoting the statutory language: "intent or reason to believe that the information to be obtained is to be used to the injury of the United States *or* to the advantage of any foreign nation" (Pet. 10). It would, however, be difficult to extract an articulated argument from this typographical innuendo.

[11] There is ample evidence to show that the revealed information would injure the United States as well as benefit the U. S. S. R. (see *supra*, pp. 94–98). But the jury was unequivocally instructed that either was sufficient, and it is not wholly certain that petitioners would have been convicted if the court had adopted their theory in its instructions. We therefore do not urge that the instructions, if erroneous, were not prejudicial.

the information * * * is to be used to the injury of the United States, or to the advantage of any foreign nation." Plainly enough, the guilty intent may be either to injure the United States or to benefit a foreign nation.

The legislative history of this portion of the Espionage Act shows with clarity that Congress understood the phrase "or to the advantage of any foreign nation" to mean something over and above "injury to the United States."

The Defense Secrets Act of 1911 (*supra*, pp. 44–45) punished whoever went on the forbidden vessel or place for the purpose of obtaining national defense information "to which he is not lawfully entitled." S. 8148, introduced into the 64th Congress, retained the same limitation (Appendix B, *infra*, p. 11). The phrase was bitterly criticized as being without meaning. 54 Cong. Rec. 3486, 3498, 3585. Senator Cummins thought that the Section should require as an element of the crime an intent either to injure his own country or to aid or abet another country. 54 Cong. Rec. 3485, 3487, 3488, 3498, 3499.[12] However, no amendment was made at this time. In the 65th Congress, H. R. 291 adopted the position urged by petitioners, and punished only obtaining and revealing information with "intent or knowledge, or reason to believe that

[12] Senator Walsh, who also thought these terms were too broad, disagreed and thought such intention should not be an element of crime. 54 Cong. Rec. 3498–3499.

the information is to be used to the injury of the United States" (Appendix B, *infra*, p. 121). See 55 Cong. Rec. 1591, 1696, 1717–1718, 1721, 1756, 1759. But S. 2, as reported by the Senate Judiciary Committee, inserted a provision which punished obtaining and revealing information "with intent or knowledge that the information is to be used to the injury of the United States, or to the advantage of any foreign nation" (Appendix B, *infra*, p. 116). 55 Cong. Rec. 778. This evidently reflects the views of Senator Cummins in the 64th Congress, under which aid to a foreign nation did not necessarily include injury to the United States. The Conference Committee, except for substituting the House "reason to believe" for the Senate "knowledge," accepted the Senate version. The House managers expressly explained to the House that it had adopted the Senate version (*supra*, p. 52). It is, accordingly, plain that the alternative intent—aid to a foreign nation—was deliberately adopted by the Congress.

One need not seek far to find persuasive reasons why Congress chose to punish obtaining and revealing national defense information "with intent or reason to believe that the information * * * is to be used * * * to the advantage of any foreign nation." In 1917, as at the present time, it was not too easy to divide foreign nations into immutable categories of friendly and antagonistic

powers. The advantage of a foreign nation might not today be the injury of the United States, but yet be a real threat tomorrow. And certainly Congress could not have intended that each person with access to national-defense information be allowed to decide for himself what foreign nation could obtain the information without danger to the United States. It was, therefore, reasonable, if not imperative, to punish those who obtained and revealed the information with the intent or reason to believe that it would be used to the advantage of a foreign nation, whatever their estimate of its likelihood of injury to the United States.

C. PETITIONERS' CONVICTION ON THE CONSPIRACY COUNT NEED NOT BE CONSIDERED

Petitioners also state that the acquittal of Natasha Gorin required an instructed verdict of not guilty on Count 3, the conspiracy count (Br. 23, 55). But they present no argument on this score (see Br. 55). The court below, in any event, was plainly correct in holding (R. 735–736) that it need not consider this contention since the sentences on Count 3 were the same as those on Count 2 and were to be served concurrently with those sentences. *Brooks* v. *United States*, 267 U. S. 432, 441; *Pierce* v. *United States*, 252 U. S. 239, 252; *Abrams* v. *United States*, 250 U. S. 616, 619; *Evans* v. *United States*, 153 U. S. 608; *Claassen* v. *United States*, 142 U. S. 140.

CONCLUSION

For the reasons set out above, it is respectfully submitted that petitioners were properly convicted and that the decision below should be affirmed.

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DECEMBER 1940.

APPENDIX A

Espionage Act of June 15, 1917, c. 30, 40 Stat. 217 (50 U. S. C., Supp. V, Secs. 31–38):

TITLE I. ESPIONAGE

SECTION 1. That (a) whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers or agents, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, or stored, under any contract or agreement with the United States, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place within the meaning of section six of this title; or (b) whoever for the pur-

pose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts, or induces or aids another to copy, take, make, or obtain, any sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or (c) whoever, for the purposes aforesaid, receives or obtains or agrees or attempts or induces or aids another to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts or induces or aids another to receive or obtain it, that it has been or will be obtained, taken, made or disposed of by any person contrary to the provisions of this title; or (d) whoever, lawfully or unlawfully having possession of, access to, control over, or being intrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note relating to the national defense, willfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or (e) whoever, being intrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map,

mode, note, or information, relating to the national defense, through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or both.

SEC. 2. (a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: *Provided,* That whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished by death or by imprisonment for not more than thirty years; and (b) whoever, in time of war, with intent that the same shall be communicated to the enemy, shall collect, record, publish, or communicate, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with re-

spect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for not more than thirty years.

SEC. 3. [As amended by the Act of May 16, 1918, c. 75, 40 Stat. 553.] Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, or shall willfully make or convey false reports or false statements, or say or do anything except by way of bona fide and not disloyal advice to an investor or investors, with intent to obstruct the sale by the United States of bonds or other securities of the United States or the making of loans by or to the United States, and whoever, when the United States is at war, shall willfully cause or attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States, and whoever, when the United States is at war, shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval

forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States into contempt, scorn, contumely, or disrepute, or shall willfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies, or shall willfully display the flag of any foreign enemy, or shall willfully by utterance, writing, printing, publication, or language spoken, urge, incite, or advocate any curtailment of production in this country of any thing or things, product or products, necessary or essential to the prosecution of the war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of the war, and whoever shall willfully advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated, and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both: *Provided*, That any employee or official of the United States Government who commits any disloyal act or utters any unpatriotic or disloyal language, or who, in an abusive and violent manner criticizes the Army or Navy

or the flag of the United States shall be at once dismissed from the service. Any such employee shall be dismissed by the head of the department in which the employee may be engaged, and any such official shall be dismissed by the authority having power to appoint a successor to the dismissed official.

SEC. 4. If two or more persons conspire to violate the provisions of sections two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this title shall be punished as provided by section thirty-seven of the Act to codify, revise, and amend the penal laws of the United States approved March fourth, nineteen hundred and nine.

SEC. 5. Whoever harbors or conceals any person who he knows, or has reasonable grounds to believe or suspect, has committed, or is about to commit, an offense under this title shall be punished by a fine of not more than $10,000 or by imprisonment for not more than two years, or both.

SEC. 6. The President in time of war or in case of national emergency may by proclamation designate any place other than those set forth in subsection (a) of section one hereof in which anything for the use of the Army or Navy is being prepared or constructed or stored as a prohibited place for the purposes of this title: *Provided,* That he shall determine that information with respect thereto would be prejudical to the national defense.

SEC. 7. Nothing contained in this title shall be deemed to limit the jurisdiction of the general courts-martial, military commissions, or naval courts-martial under sections thirteen hundred and forty-two, thirteen hundred and forty-three, and sixteen hundred and twenty-four of the Revised Statutes as amended.

SEC. 8. The provisions of this title shall extend to all Territories, possessions, and places subject to the jurisdiction of the United States whether or not contiguous thereto, and offenses under this title when committed upon the high seas or elsewhere within the admiralty and maritime jurisdiction of the United States and outside the territorial limits thereof shall be punishable hereunder.

SEC. 9. The Act entitled "An Act to prevent the disclosure of national defense secrets," approved March third, nineteen hundred and eleven, is hereby repealed.

APPENDIX B

PRIOR DRAFTS OF THE BILLS WHICH BECAME THE ESPIONAGE ACT OF 1917

1. S. 8148 (64th Cong., 2d Sess.) as reported by the Judiciary Committee on February 28, 1917:

CHAPTER I

ESPIONAGE

SEC. 1. That (a) whoever, for the purpose of obtaining information respecting the national defense to which he is not lawfully entitled, goes upon, or enters, flies over, or induces or aids another to go upon, enter, or fly over any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, owned or constructed, or in progress of construction by the United States, or under the control of the United States, or of any of its officers or agents, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, or stored under any contract or agreement with the United States, or with any person on behalf of the United States, or otherwise on behalf of the

United States, or any prohibited place within the meaning of section six of this chapter; or (b) whoever, for the purpose aforesaid, and without lawful authority, copies, takes, makes, or obtains, or attempts, or induces or aids another to copy, take, make, or obtain, any sketch, photograph, photographic negative, blue print, plan model, instrument, appliance, document, writing, or note of anything connected with the national defense; or (c) whoever, for the purpose aforesaid, receives or obtains or agrees or attempts or induces or aids another to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reasonable ground to believe, at the time he receives or obtains, or agrees or attempts or induces or aids another to receive or obtain it, that it has been or will be obtained, taken, made or disposed of by any person contrary to the provisions of this chapter; or (d) whoever, lawfully or unlawfully having possesion of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, model, instrument, appliance, note, or information relating to the national defense, willfully communicates or transmits or attempts to communicate or transmit the same to any person not lawfully entitled to receive it, or wilfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or (e) whoever, being entrusted with or having law-

ful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, model, note, or information, relating to the national defense, through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted or destroyed, shall be punished by a fine of not more than ten thousand dollars, or by imprisonment for not more than two years, or both.

SEC. 2. (a) Whoever, having committed or attempted to commit any offense defined in the preceding section, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, model, note, instrument appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: *Provided*, That whoever shall violate the provisions of this paragraph of this section in time of war shall be imprisoned for a term of not less than twenty years, or for life; and (b) whoever, in time of war, with intent that the same shall be communicated to the enemy, shall collect, record, publish, or communicate, or attempt to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the

armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense or calculated to be, or which might be, directly or indirectly, useful to the enemy, shall be punished by death or by a fine of not less than one thousand dollars and by imprisonment for not more than thirty years; and (c) whoever, in time of war, in violation of regulations to be prescribed by the President, which he is hereby authorized to make and promulgate, shall collect, record, publish, or communicate, or attempt to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense calculated to be, or which might be, useful to the enemy, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than three years or by both such fine and imprisonment.

SEC. 3. That whoever, in time of war, shall directly or indirectly, cause or attempt to cause disaffection in the military or naval forces of the United States, with the intent to interfere with or prevent the success of

the armed forces of the Nation, or to promote the success of the enemies, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not less than ten years, or by both such fine and imprisonment.

SEC. 4. If two or more persons conspire to violate the provisions of sections two or three of this chapter, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this chapter shall be punished as provided by section thirty-seven of the Act to codify, revise, and amend the penal laws of the United States approved March fourth, nineteen hundred and nine.

SEC. 5. Whoever harbors or conceals any person whom he knows or has reasonable grounds for believing or suspecting of having committed or to be about to commit an offense under this chapter, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than two years, or both.

SEC. 6. The President of the United States shall have power in time of war or in case of military necessity to designate any place other than those set forth in paragraph (a) of section one hereof in which anything for the use of the Army or Navy is being prepared or constructed as a prohibited place for the purposes of this chapter on the ground that information with respect thereto would be prejudicial to the national defense; he shall further have the power, on

the aforesaid ground, in time of war or in case of military necessity to designate any matter, thing, or information belonging to the Government, or contained in the records or files of any of the executive departments, or of other Government offices, as information relating to the national defense, to which no person (unless duly authorized) shall be lawfully entitled within the meaning of this chapter.

2. S. 2 (65th Cong., 1st Sess.) as reported by the Senate Judiciary Committee on April 3, 1917:

CHAPTER II

ESPIONAGE

SECTION 1. That (a) whoever, for the purpose of obtaining information respecting the national defense with intent or knowledge that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, or enters, flies over, or induces or aids another to go upon, enter, or fly over any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers or agents, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, re-

paired, or stored under any contract or agreement with the United States, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place within the meaning of section six of this chapter; or (b) whoever, for the purpose aforesaid, and with like intent or knowledge, copies, takes, makes, or obtains, or attempts, or induces or aids another to copy, take, make, or obtain, any sketch, photograph, photographic negative, blue print, plan, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or (c) whoever, for the purpose aforesaid, receives or obtains or agrees or attempts or induces or aids another to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reasonable ground to believe, at the time he receives or obtains, or agrees or attempts or induces or aids another to receive or obtain it, that it has been or will be obtained, taken, made or disposed of by any person contrary to the provisions of this chapter; or (d) whoever, lawfully or unlawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, model, instrument, appliance, or note relating to the national defense, willfully communicates or transmits or attempts to communicate or transmit the same to any person not lawfully entitled to receive it, or willfully retains the same and fails to deliver it on de-

mand to the officer or employee of the United States entitled to receive it; or (e) whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, model, note, or information, relating to the national defense, through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or both.

SEC. 2. (a) Whoever, having committed or attempted to commit any offense defined in the preceding section, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: *Provided,* That whoever shall violate the provisions of this paragraph of this section in time of war shall be punished by death or by imprisonment for not less than five years; and (b) whoever, in time of war, with intent that the same shall be communicated to the enemy, shall collect, record, publish, or com-

municate, or attempt to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense or calculated to be, or which might be, directly or indirectly, useful to the enemy, shall be punished by death or by imprisonment for not less than thirty years; and (c) whoever, in time of war, in violation of regulations to be prescribed by the President, which he is hereby authorized to make and promulgate, shall collect, record, publish, or communicate, or attempt to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans, or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense calculated to be, or which might be, useful to the enemy, shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years or by both such fine and imprisonment: *Provided,* That nothing in this section shall be construed to limit or restrict, nor shall any regulation herein provided for limit or restrict, any discussion, comment,

or criticism of the acts or policies of the Government or its representatives, or the publication of the same: *Provided,* That no discussion, comment, or criticism shall convey information prohibited under the provisions of this section.

SEC. 3. Whoever in time of war shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of their enemies and whoever in time of war shall willfully cause or attempt to cause disaffection in the military or naval forces of the United States to the injury of the service or of the United States shall be punished by imprisonment for not more than twenty years.

SEC. 4. If two or more persons conspire to violate the provisions of sections two or three of this chapter, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this chapter shall be punished as provided by section thirty-seven of the Act to codify, revise, and amend the penal laws of the United States approved March fourth, nineteen hundred and nine.

SEC. 5. Whoever harbors or conceals any person whom he knows, or has reasonable grounds for believing or suspecting of having committed or to be about to commit an offense under this chapter, shall be punished by a fine of not more than $10,000 or by imprisonment for not more than two years, or both.

SEC. 6. The President of the United States shall have power in time of war or in case of national emergency to designate any place other than those set forth in paragraph (a) of section one hereof in which anything for the use of the Army or Navy is being prepared or constructed or stored as a prohibited place for the purposes of this chapter on the ground that information with respect thereto would be prejudicial to the national defense; he shall further have the power, on the aforesaid ground, in time of war or in case of national emergency to designate any matter, thing, or information belonging to the Government, or contained in the records or files of any of the executive departments, as information relating to the national defense, to which no person unless duly authorized shall be lawfully entitled within the meaning of this chapter.

3. H. R. 291 (65th Cong., 1st Sess.) as passed by the House of Representatives on May 4, 1917:

TITLE I

ESPIONAGE

SECTION. 1. Whoever, with intent or knowledge, or reason to believe that the information to be obtained is to be used to the injury of the United States, copies, takes, makes, or obtains, or attempts to copy, take, make, or obtain, any sketch, photograph, photographic negative, blue print, plan, model, instrument, appliance, document, writing, code book, or signal book, connected with the national defense, or any copy thereof, or with like intent or knowledge, or reason to believe, directly or indirectly, gets or attempts to get information concerning the national defense shall, upon conviction

thereof, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both.

SEC. 2. Whoever, with intent or knowledge, or reason to believe that it is to be used to the injury of the United States communicates, delivers, transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction, or party or military or naval force within a foreign country, whether or not recognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, any information, document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, model, note, instrument, or appliance, relating to the national defense, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment for not more than twenty years, or both: *Provided,* That whoever violates this section in time of war shall, upon conviction thereof, be punished by imprisonment for not more than thirty years, or by death.

SEC. 3. Whoever, having possession of, access to, control over, or being entrusted with any information, document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, model, instrument, appliance, or note, belonging to, intended for, or under the control of the United States, relating to the national defense, willfully and without proper authority communicates or transmits or attempts to communicate or transmit the same to any person, or willfully retains the same and fails to deliver it on demand to the person lawfully entitled to receive it, or through gross negligence permits the same to be removed from its proper place of custody, or

delivered to anyone not lawfully entitled to receive it, or to be lost, stolen, abstracted or destroyed, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both.

SEC. 4. During any national emergency resulting from a war to which the United States is a party, or from imminence of such war, the publishing willfully and without proper authority of any information relating to the national defense that is or may be useful to the enemy is hereby prohibited; and the President is hereby authorized to declare by proclamation the existence of such national emergency and is hereby authorized from time to time by proclamation to declare the character of such information which is or may be useful to the enemy; and in any prosecution hereunder the jury trying the cause shall determine not only whether the defendant or defendants did willfully and without proper authority publish the information relating to the national defense as set out in the indictment, but also whether such information was of such character as to be useful to the enemy: *Provided,* That nothing in this section shall be construed to limit or restrict any discussion, comment, or criticism upon any fact or any of the acts or policies of the Government or its representatives, or the publication of the same.

Whoever violates the foregoing provision shall upon conviction thereof be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both.

SEC. 5. Whoever in time of war willfully makes or conveys false reports or false

statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of the enemy, or whoever in time of war willfully causes or attempts to cause insubordination, disloyalty, or refusal of duty in the military or naval forces of the United States shall be punished by a fine of not more than $10,000, or by imprisonment for not more than twenty years, or both.

SEC. 6. If two or more persons conspire to violate sections two, four, or five, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to the conspiracy shall be punished as provided in such sections in the case of the doing of the act the accomplishment of which is the object of the conspiracy. Except as above provided conspiracies to commit offenses under this title shall be punished as provided by section thirty-seven of the Act entitled "An Act to codify, revise, and amend the penal laws of the United States," approved March fourth, nineteen hundred and nine.

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TITLE XII

GENERAL PROVISIONS

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SEC. 1202. The term "national defense" as used herein shall include any person, place, or thing in anywise having to do with the preparation for or the consideration or execution of any military or naval plans, expeditions, orders, supplies, or warfare for the advantage, defense, or security of the United States of America.

U. S. GOVERNMENT PRINTING OFFICE: 1940

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